IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.,

LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,
Respondents.

ON WRIT OF CERTIORARI FROM THE
SUPREME COURT OF GEORGIA

Errata Sheet to Petitioners' Brief

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Petition for Certiorari Filed February 16, 1972

Errata Sheet

Cover, "Mell S. Friedman, Esq." should be "Mel S. Friedman, Esq."

Page ii, Line 13, "provisional" should be "procedural".

Page 12, Line 3, should read "than communication of other ideas. In *Stanley* there was no".

Page 14, Line 12, should read "rationale) cannot be left ajar; it must be kept tightly".

Page 22, Line 27, "accompainment" should be "accompaniment".

Page 30, Line 8, should read "opinion, relying on the provisions of *Redrup v. New York, supra.*"

Page 31, Line 12, should read "minors were permitted on the premises and that a modest but".

Page 33, Line 9, should read "Of the motion pictures involved, in none are".

Page 34, Line 8, "pretence" should be "pretense".

Page 54, Line 13, "retain" should be "retail".

Page 55, Line 13, "transcedent" should be "transcendent".

Page 59, Line 27, "devient" should be "deviant".

Page 74, Line 12, "negligent-homocide" should be "negligent-homicide".

Page 78, Line 21, "PROVISIONAL" should be "PROCEDURAL".

Page 94, Line 10, "Tennage" should be "Teenage".

Page 96, Line 6, "mailes." should be "mails."

Page 96, Line 8, "stereotypicany" should be "stereotypically".

Page 96, Line 8, "sophitisticated" should be "sophisticated".

Page 96, Line 18, should read "and that the emphasis in so-called obscenity litigation should".

Page 108, Line 8, "definiton" should be "definition".

Page 108, Line 23, should read "minors or offering to exhibit to minors contrary to any state".

Page 108, Line 25, "Ideed" should be "Indeed".

Page 110, Line 2, should read "of *First Amendment* rights of Petitioners therein stated:".

Page 111, Line 11, "and;or" should be "and/or".

Page 111, Line 15, should read "629 (1968), in holding the state statute in question constitutional as reflecting".

Page 111, Lines 26 and 27, delete in their entirety.

Page 112, Line 4, " 'juveniles.' " should be " 'juveniles,' ".

Page 112, Line 5, "Ginzburg pandering" should be "*Ginzburg* pandering".

Page 112, Line 6, "and;or" should be "and/or".

Page 114, Line 30, should read "in *Roth*, at page 47, 'sex and obscenity are not synonymous.' "

Page 121, Line 4, "Stanley" should be italicized.

Page 121, Line 8, "procoursor" should be "precursor".

Page 127, Line 28, "Rehyquist" should be "Rehnquist".

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PETITIONERS' BRIEF

OPINIONS BELOW

The Order of the Trial Judge in the Superior Court of Fulton County is not reported and is found on pages 33 and 34 of the Appendix herein. The decision of the Supreme Court of Georgia and the Order denying the Motions for a

Rehearing are found on pages 1 through 5 and 14 of the Appendix, respectively. The decision of the Supreme Court of Georgia is reported at 228 Ga. 343 (1971).

JURISDICTION

The Supreme Court denied the Petitions for Rehearing and substituted its final opinion for that entered on November 5, 1971 on November 18, 1971. The Petition for a Writ of Certiorari was filed February 16, 1972 pursuant to *28 U.S.C. § 1257 (3).* On June 26, 1972, this Court granted certiorari.

QUESTIONS PRESENTED

1. Whether The Two (2) Motion Picture Films Which Are The Subject Matter Of These Proceedings, And Determined By The Trial Court To Be Not Obscene, But By The Supreme Court Of The State Of Georgia To Be Obscene, Are Not Obscene In The Constitutional Sense And Are Protected Expression Under The *First* and *Fourteenth Amendments* To The *United States Constitution?*

2. Whether There Can Be A Constitutionally Valid Judical Determination Of Obscenity As To Each Of The Films Brought Before The Supreme Court, Consistent With Petitioners' Rights To Procedural And Substantive Due Process Required By The *Fifth* and *Fourteenth Amendments* To The *Constitution Of The United States,* In The Absence Of Any Affirmative Evidence On Each Of The Constitutionally Relevant Elements Of The Standards For Judging Proscribable Obscenity Under The *First Amendment?*

3. Whether The State Of Georgia May, Consistent With The *First, Fourth, Fifth,* and *Fourteenth Amendments* To The *Constitution Of The United States,* Utilize *Ad Hoc* Procedures To Enjoin Dissemination Of Presumptively Protected *First Amendment* Materials Where There Is No Statutory Or Authoritative Judicial Decision Authorizing The Same With Appropriate Procedural Safeguards?

4. Whether The Display Of Any Sexually Oriented Films In A Commercial Theatre, When Surrounded By Notice To The Public Of Their Nature And By Reasonable Protection Against Exposure Of The Film To Juveniles, Is Constitutionally Protected?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* and the *Code of Georgia, § 26-2101,* are found in Appendix D of the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners Paris Adult Theatre I and Paris Adult Theatre II comprise an "Adults Only" theatre at 320 Peachtree Street, N.E., Atlanta, Georgia. Entrance to each of the two theatres is gained through a common lobby. On December 28, 1970, the movie, "It All Comes Out In The End" was showing in one theatre and the movie, "Magic Mirror" was showing in the other. Investigators of the Criminal Court of Fulton County viewed each of the films on the above date (A. 50, 56). Subsequently, on the same day, two separate complaints (one

for each film and theatre) were filed in equity, asking that the films be declared obscene and that their further exhibition be temporarily and permanently enjoined after a hearing on the issue of obscenity (A. 19-21; 38-40). Various personnel of the theatres, none of whom are appellants herein, were served with the complaints and the order of the Superior Court of Fulton County temporarily restraining and enjoining the defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of the Court. Defendants were further ordered to have one print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same. (A. 22, 23, 41-45).

On the 13th day of January, 1971, the films were produced by attorneys for the theatres, after one of the defendants served had been held in contempt for refusing to furnish the films on the ground that to do so might incriminate him (A. 49, 50).

The hearing was stipulated by the parties to be a final one (A. 35). At said hearing on the issue of the obscenity of the films, no evidence was introduced by Respondents as to their obscenity, except the films themselves. There was no evidence that the films, when considered as a whole, predominantly appealed to a prurient interest in nudity, sex or excretion. There was no evidence that said films were patently offensive because they went substantially beyond the customary limits of candor in the depiction of sex or nudity, applying contemporary community standards. There was no evidence by the Respondent of any kind as to what

constituted the contemporary community standards of any community, local, state, or national.

On the other hand, Petitioners produced testimony that the predominant appeal of the films was not to a prurient interest in sex (A. 70) and that the films were of value to society (A. 70, 71).

Evidence revealed that the theatres were for "Adults Only" and that the films were not advertised, except as to their name (A. 51, 52). There was no evidence that minors had ever entered the theatres or seen the films and there was evidence of an intent to exclude minors (A. 57).

At the conclusion of the evidence, the Trial Court took under advisement the Motions To Dismiss filed by Petitioners which raised, *inter alia,* the contention that the films were not obscene in the constitutional sense as a matter of law and were protected expression, under the *First* and *Fourteenth Amendments,* to the *Constitution of the United States.* Subsequently, the Trial Court granted the Motions to Dismiss on the ground that the films were not obscene. (A. 33, 34). Timely appeal was taken by Respondents, and the Trial Court was reversed on November 5, 1971 (A. 1) with Petitions for Rehearing being denied on November 18, 1971 (A. 14).

SUMMARY OF ARGUMENT

1.

The two motion pictures found obscene by the Supreme Court of Georgia are not hard-core pornography and are not obscene in the constitutional sense. Borderline materials are entitled to the mantle of the full constitutional protections of Free Speech and Press under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*, unless the rights of those whom the state has a legitimate interest in protecting are encroached upon. *Roth v. United States*, 354 U.S. 476, 489 (1957), made clear that the door barring Federal and State intrusion into the Free Speech and Press area must be opened only as far as necessary to prevent encroachment upon more important interests. Those interests are suggested by the dissent of Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463 (1966), which later became the foundation of the *per curiam* opinion of the Court in *Redrup v. New York*, 386 U.S. 767 (1967). These interests, as suggested in *Redrup, supra*, are exemplified by a statute with a specific or limited concern for juveniles; by "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it"; and by the sort of pandering found significant in *Ginzburg v. United States, supra.*

The films involved herein are comparable to those found not to be obscene by this Court in the reversals of obscenity determinations which have cited only *Redrup, supra.* Where, as here, the *Redrup* factors are not present, the films are not obscene and are entitled to constitutional protection.

2.

In proceeding to determine whether materials are obscene, the censor or, in this case, the representatives of the State of Georgia who are Respondents herein have the affirmative responsibility to adduce appropriate evidence to establish each element of obscenity, as it may be defined to comport with Constitutional guarantees. The Respondents herein did not introduce any evidence on' any of the constitutionally required elements of obscenity, but instead placed only the films themselves into evidence. The Georgia Supreme Court thus condemned the films without any affirmative evidence other than the films. The censorship of press materials without affirmative evidence other than the films themselves is no more than a misuse of the doctrine of *res ipsa loquitur* and a violation of *First Amendment* rights.

Affirmative proof of each element is required because, without guidance from experts or otherwise, judges and juries are unable to apply the *Roth* standard with anything more definite or objective than their own personal standards of prudence and decency. Members of a jury or the triers of fact are governed by their own standards and not those of the community as a whole, whether state-wide or national. Yet, they must determine contemporary community standards and then compare the materials in question to determine whether they go substantially beyond the limits of candor. They cannot do this without evidence except by the exercise of unfettered discretion, which is not appropriate in determining whether material is entitled to the protection of the *First Amendment*. Similarly, a court or judge cannot take judicial notice of community standards.

To allow a case to go to a jury of laymen or triers of fact on the question of the prurient appeal of the material is to invite the equating, in the minds of the jurors, and/or triers of fact, of patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspicion about the prurient appeal of material to people whose psyche is not known.

The appropriate community standards by which the material is to be judged are those of the national community, and courts and jurors are less able to apply those to the material without the aid of testimony as to what the standards are.

The standards for judging obscenity are inherently vague and imprecise, and the opinion of the trial judge herein shows the difficulty he had in applying it to the material involved herein. The legal writers and commentators have had the same difficulty in understanding the meaning of the standards for judging obscenity, and numerous state courts have reached the conclusion that affirmative evidence is needed to aid in applying this Court's standards.

A consideration of the separate elements of the test reveals that lawyers, judges and jurors alike are not qualified to determine what a "shameful or morbid interest" in sex or nudity is, or when it constitutes the "primary appeal" of the material. Only expert evidence will provide an objective, rather than a subjective, basis for the fact finder's verdict.

Locally selected jurors cannot be assumed to know what "national" (or even local) contemporary community standards are.

Only expert testimony can establish that materials are "utterly without redeeming social value", given the many artistic, literary, historical, entertainment, informational, and other values which are recognized in this society. The changes in social values, as evidenced by the increasing interest in matter relating to human sexual activities is an indication that the presence or absence of the elements of obscenity cannot be assumed, but must be proven, so as to provide the basis for an objective determination.

The censor has the burden of proving the obscenity of materials alleged to be obscene and to allow such a determination of obscenity to be made without proof of the elements required, denies due process of law and in this context, undermines a broad category of rights guaranteed under the Free Speech and Press provisions of the *Constitution*, as well.

The failure to provide expert testimony on the presence of each element of obscenity in essence shifts the burden of proof to the defendant to prove the nonobscenity of the questioned materials and effectively denies due process.

The application of a *res ipsa loquitur* approach is not appropriate because, unlike the situation involved in negligence cases, the trier of fact in an obscenity case cannot be assumed to be in contact with the requisite facts on an every-day basis as in the typical negligence situation. This is evidenced by the large number of reversals by this Court of determinations of obscenity by juries. Moreover, the standard of guilt in an obscenity case, where the rights of Free Speech and Press are concerned, must be those of "beyond a

reasonable doubt" and not the "preponderance of the evidence" standard of a negligence case.

A failure to require proof of each element of obscenity denies the right to confront witnesses against your position and denies effective assistance of counsel as well.

3.

The decisions of this Court have made clear that a state is not free to deal with obscenity in any way it sees fit without regard for the effect upon materials entitled to constitutional protection. Any prior restraint on expression comes to this Court with a heavy presumption against its constitutionality. The *ad hoc* procedure employed by Respondents herein is not authorized by statute and lacks procedural safeguards against the undue inhibition of protected expression. The Respondents were not obligated to seek judicial review of the trial court's determination within any given time period (except that applicable to all appeals, 30 days) and the trial judge was under no obligation to render a judicial decision within any stated period of time.

The utter lack of procedural safeguards herein is contrary to case law as set forth in numerous decisions of this Court and the Petitioners, who already have been deprived of their films for nearly 20 months, are entitled to a declaration that their *First, Fourth, Fifth* and *Fourteenth Amendment* rights have been violated and to a reversal of the decision of the Supreme Court of Georgia.

4.

The all-encompassing list of types of materials which persons such as the writers of the Minority Report of the Commission on Obscenity and Pornography claimed to be unprotected makes it clear that this Court will continue to be inundated with obscenity cases unless it adopts an approach which focuses less on the content of allegedly unprotected materials and more on the manner (conduct) of dissemination. Such an approach is that suggested by Professor Thomas I. Emerson in his work, *The System of Freedom of Expression*, wherein he characterizes the thrusting of offensive materials upon those unwilling to view or to receive them as "action".

Such an approach makes the definition of obscenity irrelevant until such time as the allegedly obscene materials have been disseminated in such a way as to encroach upon the rights of others.

In this case, there was no intrusion into the privacy of unwilling individuals who wished to avoid confrontation with the sexually oriented films exhibited by Petitioners and there was no admission of minors.

The decisions of this Court appear to have held that only when there exists an encroachment on the constitutional rights of others may government constitutionally punish an offender for violation of obscenity laws. The decision of this Court in *Redrup v. New York* delineates what may have been meant in *Roth* and *Breard* by "encroachment" upon rights of others.

The discussion in *Stanley v. Georgia* of "the right to receive ideas, regardless of their social worth," would indicate that communication of ideas about sex are no less protected than communicating other ideas. In *Stanley* there was no encroachment upon the rights of others and the possession of concedely obscene films was held to be constitutionally protected. On the other hand, in *United States v. Reidel, supra,* and *United States v. Thirty-Seven Photographs, supra,* both of which involved materials either conceded to be obscene or assumed to be so for the purposes at hand, the manner of dissemination could not be said to exclude intrusion upon the privacy of those unwilling to receive the materials or to exclude distribution to minors. Thus, the question involved here was not resolved by those opinions. Nor are the materials conceded to be obscene in this case.

The concurring opinion of Mr. Chief Justice Burger in *Rabe v. Washington, supra,* indicates once again that it is blatant "public displays of explicit materials" which involve no "significant countervailing *First Amendment* considerations." The facts of the case make clear that "public" used therein meant "intrusive and unavoidable."

ARGUMENT

1. THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE TRIAL COURT TO BE NOT OBSCENE, BUT BY THE SUPREME COURT OF THE STATE OF GEORGIA TO BE OBSCENE, ARE NOT OBSCENE IN THE CONSITUTIONAL SENSE AND ARE PROTECTED EXPRESSION UNDER THE *FIRST AND FOURTEENTH AMENDMENTS* TO THE *UNITED STATES CONSTITUTION.*

At the time of the hearing before the Trial Court in the case at bar, the Prosecution contended that the two (2) movies were obscene under Georgia Law and under the *First Amendment* to the *Constitution of the United States.* Counsel for Petitioners contended that the two (2) motion picture films before the Court were not hard-core pornography or obscene in the constitutional sense as set forth in the various constitutional standards for judging obscenity set forth by the members of this Court in *Redrup v. New York*, 386 U.S. 767 (1967). Petitioners, by their counsel, further contended before the Trial Court that the movies were, at the most, borderline, as would be all publications that dealt with an erotic theme, but that did not render them obscene in the constitutional sense.

Counsel for Petitioners further contended that borderline publications are entitled to the mantle of the full constituional protections of Free Speech and Press under the *First* and *Fourteenth Amendments* to the *Constituion of the United States unless* the conduct of the exhibitor was such as to encroach on the rights of others whose responsibility it was

for the State of Georgia to protect through its legal processes.

In this regard, Counsel for Petitioners was relying on the words of the Court set forth in *Roth v. United States*, 354 U.S. 476 (1957) at page 489 where it was written:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the State. The door barring federal and state intrusion into this area (obscenity litigation and the free press rationable) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

Counsel for Petitioners herein urged to the Trial Court that the comment in the dissent of Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463 (1966) which later became the foundation of the *Per Curiam* opinion of the Court. *Redrup v. People of the State of New York, supra*, was particularly applicable where the learned Justice wrote, in part, as follows at footnote 1 of his opinion at page 498:

> "1. Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e.g., Breard vs. Alexandria, 341 U.S. 622; Public Utilities Commission v. Pollak, 343 U.S. 451; Griswold vs. Connecticut, 381 U.S. 479. Still other considerations might come

into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case."

The words of the Court in the *Per Curiam* Opinion in *Redrup v. New York, supra* contain in essence the same observation made by Mr. Justice Stewart in *Ginzburg v. U.S.* where the Court at page 769 wrote as follows:

"IN NONE of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince vs. Massachusetts, 321 U.S. 158; cf. Butler vs. Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard vs. Alexandria, 341 U.S. 622; Public Utilities Comm'n vs. Pollak, 343 U.S. 622. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg vs. United States, 383 U.S. 462."

The Trial Court was also exposed to a list of the cases considered by the U.S. Supreme Court which had been reversed predicated on *Redrup v. New York, Supra.* Predicated on what the Trial Court understood was meant by the various rulings of this Court as to non-hard-core material, the said Trial Court sitting as both Judge and Jury in its written opinion dated April 12, 1971 and reproduced in full in the Appendix to this Petition, stated in part as follows:

"Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be

considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness."

"It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against exposure of these films to minors, is constitutionally permissible."

"It is the Judgement of this Court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene."

The Trial Court was, we suggest, correctly following the law as it has been ennuciated by this Court in the decisional processes. This Court has considered films of even a more explicit nature than the motions pictures at bar and in the absence of factors which would suggest circumstances of dissemination that would intrude onto the rights of others, or minors, have reversed the following based on *Redrup v. New York, Supra:*

1. *Harry Schackman v. California,* 388 U.S. 454 (1967).

This Court reversed the Superior Court of California which had affirmed the conviction of appellant for utilizing coin operated "peep-show movies" that were charged as being obscene. The Supreme Court decision was per curiam,

contained no description of the movies and referred to *Redrup* as controlling authority for holding the movies not obscene.

A look at the travel of the case will reveal a description of the films by the United States District Court for the Central District of California in the matter styled *Schackman v. Arnebergh*, 258 F. Supp. 983 (1966). The appellant originally had been arrested for trial in a California state court. The defendant thereafter filed a complaint in federal court seeking to convene a three-judge court on constitutional grounds, which relief was refused. An appeal was then taken to the Supreme Court of the United States which held by per curiam opinion that the proper route of appeal in those circumstances was by way of the Court of Appeals and denied the appeal, *Schackman v. Arnebergh*, 387 U.S. 427. Thereafter the state trial court convicted the defendant and he appealed through the state courts and ultimately to the Supreme Court of the United States where his conviction was reversed and the Court held the material not obscene.

The descriptive opinion in the federal district court, 258 F. Supp. 983, stated, *inter alia*:

"1. As to 0-12:

"The film consists of a female model clothed in a white blouse open in the front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, lips and torso, all clearly indicative of engaging

in sexual activity, including simulated intercourse and invitations to engage in intercourse.

"There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, 'fuck you,' 'fuck me.' The dominant theme of the film taken as a whole, obviously is designed to appeal to the prurient interest in sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal area clearly showing the pubic hair and the outline of the external parts of the female genital area."

"2. 0-7:

"The model wears a garter belt and sheer transparant panties through which the pubic hair and external parts of the genitalia area clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal regions and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the film, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area."

"3. D-15 was held to be substantially the same in character and quality as the films 0-12 and 0-7.

. . .

"33. The film E-44 'Susan, referred to in paragraph 11 of the petitioners' complaint and introduced as Exhibit 4, is virtually the same as Exhibits 1, 2 and 3. In addition, the model uses her hands, fingers, lips and tongue to simulate an act of oral copulation. Again, the pubic hair is visible together with the external parts of the genitalia and the focus of the camera emphasizes this area. The model continuously simulates acts of a sexual nature, including sexual intercourse and invitations to engage in such activity. The dominant theme of the film, taken as a whole, is to the prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance.

"34. The film known as Exhibit 19, of the Los Angeles Municipal Court Case No. 150754, referred to in paragraph 4 of the complaint and introduced as Exhibit 5, was viewed by the Court. The Court finds Exhibit 5 to be not quite as repugnant nor flagrant an example as Exhibits 1 through 4. In Exhibit 5, the pubic hair cannot be seen and the simulation of sexual intercourse is not as patent. Still, the model moves her body and hands in obviously sexual ways to simulate sexual activities and the camera's focus again emphasizes the pubic and rectal regions. The dominant theme of the film, taken as a whole, is to a prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance."

In the Opinion it was further stated:

"The Court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard core sense because they come within the reasonable

purview and ambit of both the Federal judicial definition of obscenity and hard core pornography."

This Court found the above described films not to be obscene in the constitutional sense, thus in total disagreement with the findings of the learned Federal District Court trial judge. See: *Schackman v. California*, 388 U.S. 454 (1967).

2. *I. M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968).

Film strip of two nude females acting like Lesbians and fondling one another found not constitutionally obscene, citing *Redrup, supra*, as authority.

See the lower court case styled *State v. I. & M. Amusements, Inc.*, 226 N.E. 2d 567, where the Supreme Court of Ohio affirmed the Court of Appeals of Ohio, Hamilton County, convicting a motion picture corporation of exhibiting an obscene motion picture film.

The Supreme Court of Ohio set forth the descriptive testimony of an expert witness at the trial level:

"The same thing might be said of the defense expert witness on the subject of motion picture standards and practices, that the one segment of the film in question was simply 'a documentation of moving pinups, in some cases static pinups, '—a pinup being 'simply females who are, who have exposed, who are undressed within the convention of a pinup. A pinup is simply a convention of undress which excludes any dress other than a covering in the lower regions of some standard form. The movie I say was a documentation of a series of pinups who, in some cases, were in motion. In most cases were static.' "

Thereafter the Court set forth the descriptive quote of the trial judge:

> "In addition to either the static or moving pinups, the court below made a specific finding in regard to one series of scenes in the film that, 'two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians.' "

However, when the case reached this Court in *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573, the state decisions were reversed in a per curiam opinion based upon *Redrup* holding in essence that the motion picture film was not obscene for adults.

3. *Robert-Arthur Management Corp. v. Tennessee*, 388 U.S. 578 (1968).

> Motion picture film entitled *Mondo Freudo* showing women caressing one another and acting as Lesbians found not constitutionally obscene based on *Redrup, supra*, as the controlling authority therefor.

See the case styled *Robert Arthur Management Corp. v. State of Tennessee*, 414 S.W. 2d 638 (1967), wherein the Supreme Court of Tennessee, in affirming the trial court's finding that the film *Mondo Freudo* was obscene, stated:

> "We have reviewed the evidence and have seen the film. We agree with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially

beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific or artistic value and utterly without social importance."

4. *Cain v. Kentucky*, 397 U.S. 319 (March 23, 1970).

This decision involved the motion picture *I, A Woman.*

A description of the film is set forth by the Court of Appeals for Kentucky in the case styled *Cain v. Commonwealth of Kentucky*, 437 S.W. 2d 769 (1969), wherein it was stated:

"We have viewed the evidence presented to the trial jury. The film is a 90-minute motion picture devoted almost entirely to the sexual encounters of one female by the name of Eve. It opens by showing Eve nude in her bedchamber engaged in the practice of caressing herself in a suggestive manner to the accompainment of her father's violin. She progresses to a passionate love scene with her fiance, Svend, while lying fully clothed on top of him in her bedchamber. This act is performed with the camera full on the subject. From this the film proceeds to the act of intercourse with a married patient, Heinz Goertzen, in a hospital room where Eve is employed

as a nurse. This act she solicits with the use of nude photographs taken of her by her fiance for this specific purpose. During the course of the sequence, the camera focuses upon the head of the male partner and the stomach area of the female partner. It shows the male partner caressing with kisses the area between the navel and the pubic hair. The camera then shifts during the act of intercourse to the face of the female subject. After this, the film follows the life of Eve from one act of sexual intercourse to another until it has been accomplished some five times, all with different partners. Each time the act is as vividly portrayed upon the screen as was the scene in the hospital room. In one instance the sex act is in the form of rape. The film represents nothing more than a biography of sexuality. There is no story told in the film; it is nothing more than repetitious episodes of nymphomania. Nudity is exposed in such manner that if the subject had posed in person instead of on film she would have immediately been arrested for indecent exposure. We are of the opinion that the jury not only had sufficient evidence before it upon which to base its verdict but that this evidence was overwhelming."

This Court reversed this judgment in a 6-2 per curiam decision, citing *Redrup v. New York, supra,* as authority therefor.

5. *People of California v. Pinkus,* 400 U.S. 922 (1970).

This Court left standing a decision of the Ninth Circuit which held a stag movie graphically depicting a woman engaged in masturbation not to be obscene by a divided Court in affirming the judgment of the Ninth Circuit of Appeals in case there styled as *Pinkus v. Pitchess,* 429 F.2d 416.

Pinkus was charged with committing sixteen violations of the California Obscenity Statute but only nine of the sixteen were submitted to the Jury and he was found guilty. The Petition for habeas corpus followed and the Circuit Court of Appeals ultimately reversed and in doing so, stated as follows:

> "We have concluded that it was. The 'worst' of the material is described as a motion picture of a woman who, disrobed, feigns some type of sexual satisfaction which is self-induced. The film is apparently typical of the usual 'stag' movies which the courts encounter with increasing frequency. In the state court trial, the prosecution introduced no persuasive testimony that the material was offensive to contemporary notions of free expression. The district judge, as did the state court jury, made the factual determination that the film was obscene, but we have concluded that we cannot reconcile the determination with Supreme Court decisions in several cases involving comparable material. See, e.g., *Bloss v. Dykema*, U.S. , 38 U.S.L.W. 3477 (1970); *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 Sup. Ct. 1414 (1967). See especially, *Aday v. United States*, 388 U.S. 447, 18 L. Ed. 2d 1309, 87 Sup. Ct. 2095 (1967), *revg.* 357 F. 2d 855 (6th Cir. 1966).

6. *Bloss v. Michigan*, 402 U.S. 938 (1971).

This Court reversed the conviction for showing an obscene movie entitled "A Woman's Urge" of Floyd G. Bloss, citing *Redrup*. The Court of Appeals for the State of Michigan in its decision entitled *The People of the State of Michigan v. Floyd G. Bloss*, had adopted the trial judge's recital of the pertinent facts:

"The pertinent facts are set forth in the trial judge's decision on the motion for new trial:

> 'The testimony at the trial indicated that "A Woman's Urge" was shown at the Capri Theatre from February 2nd to February 8, 1966. On the evening of February 3, 1966 certain police officers and officials of the city of Grand Rapids, together with professors from Calvin and Aquinas Colleges attended the showing of "A Woman's Urge". Thereafter, a meeting was held at the prosecuting attorney's office and on the evening of February 8, 1966, members of the vice squad purchased tickets for the showing of "A Woman's Urge" and saw the entire film. Immediately thereafter, two members of the vice squad, who had seen the movie, went to the projection booth, there found Billy C. Sturgess in the projection booth, rewinding the film to "A Woman's Urge". The officers identified themselves and arrested Mr.Sturgess and seized the film incidental to the arrest. Thereafter they permitted Mr. Sturgess to continue showing the motion picture which was then being shown and subsequently brought him to the police department where he was served with a complaint and warrant. Likewise a complaint and warrant were served upon Mr. Bloss, who came to the police department at the request of the police officers. At the trial several police officers testified in detail as to the movie and applied the "Roth test" to the movie. In addition an expert witness from Aquinas College was called who testified relative to the movie and applied the Roth test. The jury, after extensive deliberation, convicted Mr. Bloss.

. . .

'We must decide, therefore, whether the film is obscene in the constitutional sense as delineated by the Supreme Court of the United States. See *Roth v. United States, supra; Redrup v. State of New York* (1967) 386 U.S. 767 (87 S.Ct. 1414, 18 L.Ed. 2d 515); *Memoirs v. Massachusetts* (1966), 383 U.S. 413 (86 S.Ct. 975, 16 L.Ed. 2d 1); *Ginzburg v. United States* (1966) 383 U.S. 463 (86 S.Ct. 942, 16 L.Ed. 2d 31); *Mishkin v. New York* (1966) 383 U.S. 502 (86 S.Ct. 958, 16 L.Ed. 2d 56). For us to find that this movie is obscene, we must find that the dominant theme of the movie as a whole appeals to prurient interest in sex, that it is patently offensive because it goes beyond contemporary community standards relating to the description or representation of sexual matters, and that it is utterly without redeeming social value. *Roth v. United States, supra.* Unless we find that these three elements coalesce, we cannot find that it is obscene. *Memoirs of a Woman of Pleasure v. Massachusetts, supra,* 419. We viewed the film, and we find the necessary coalescence here. Therefore, we find the film to be obscene.

'The film deals with the problems of a seemingly oversexed young woman. Although it has a psuedo psychoanalytical approach, its primary appeal is to prurient interest in sex. This prurient appeal is the dominant theme of the movie as a whole. The film is utterly without redeeming social value. Further, we find that it goes beyond the contemporary national community standards in its descriptions and representations of sexual matters. We would note here that in making this decision as to whether this film goes beyond the contemporary standards, we took into

consideration not just the content of the film, but also the impact of the conditions under which this content is conveyed to the viewer. By this we mean that even though the acts and occurrences if they were described in the written word would not be obscene, the visual impact of seeing the same thing acted out in a darkened room with sound accompaniment may cause it to be obscene. We find support for this distinction in *Landau v. Fording* (1966) 245 Cal. App. 2d 820 (54 Cal. Rptr. 177), *aff'd per curiam*, 38 U.S. 456 (87 S.Ct. 2109, 18 L.Ed.2d 1317) (1967) 5-4, *reh. denied*, 389 U.S. 889 (88 S.Ct. 16, 19 L. Ed. 2d 199) (1967)."

Yet, the Supreme Court of the United States granted the *Petition for a Writ of Certiorari* and reversed.

7. *Hartstein v. Missouri*, 404 U.S. 988 (1971).

On Tuesday, December 14, 1971, this Court reversed an obscenity conviction obtained in the State of Missouri. The reversal was based on *Redrup v. People of the State of New York*, 386 U.S. 767 (1967).

The Supreme Court of Missouri described the material involved, a motion picture entitled "Night of Lust," as follows:

"... [I]n most if not all instances without any relation to the plot, if any can be said to exist, are scenes of nude women including closeup protrayals of naken breasts. . . .'Night of Lust' is approximately 65 minutes in length, and approximately 40 of those

minutes consist of scenes of nude girls in various poses, actions, and sequences, which bear no relation to a plot, and apparently are presented for the sole purpose of depicting nude girls in activity suggestive of sexual intercourse or of homosexual activity.

. . .

"Under no possible standard could the motion picture 'Night of Lust' be related to art, literature or scientific works. It is the portrayal of nude women, which when considered alone may not be considered obscene according to language in *Manual Enterprises, Inc. v. Day, supra*, or obscene for adults. *Ginsberg v. State of New York, supra.* However, that is not the limits of the portrayal in 'Night of Lust.' By reason of the closeup scenes, and by use of nude body gyrations and undulations the motion picture suggests promiscuous sexual intercourse and homosexual activity which is totally unrelated to any plot. Such scenes are patently offensive and are incorporated into the picture only to appear to the prurient interest of the viewer. Such portrayals are not 'fragmentary and fleeting,' *Jacobellis v. State of Ohio, supra*, but because of the quantity of such portrayals, the result is that the dominant theme of the picture, when considered as a whole, is the suggestion of promiscuous sexual intercourse and homosexuality." (Emphasis added.)

8. *Wiener v. California*, 404 U.S. 988 (1971)

This Court reversed judgment of the Appellate Department, Superior Court of California, County of San

Diego, based on *Redrup v. People of the State of New York, supra.* The following magazines and films were the subject matter of the California judgment:

A magazine entitled "My-O-My"
A magazine entitled "Wild-n-Sassy"
A magazine entitled "Hello"
A magazine entitled "The Ballers," No. 1
A magazine entitled "Psychedelic"
A 200' color film
A 1200' color film
A 16 millimeter 400' color film
A 16 millimeter 400' color film
An 8 millimeter 400' color film

The California Superior Court, Appellate Department, affirmed the trial court:

"We do not engage in the task of translating the motion pictures or the photographs into words. Suffice it to say that we have performed one duty (as properly suggested by appellants), and exercised our independent judgment with regard to each exhibit. We conclude that under the present state of the law as developed by Roth and subsequent cases, the evidence presented by the People (with the one exception hereinafter noted) was legally and factually sufficient to support the jury's findings of guilt. We find ample evidence to support the three principal requirements already noted, to wit:

'That 1. The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

'2. The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

'3. The material is utterly without redeeming social value.' "

Yet, this Court did reverse the conviction, without opinion provisions on *Redrup v. New York, supra.*

The Georgia Supreme Court in it's first decision issued on November 5, 1971 held that there was probable cause to believe that the films were obscene and the trial judge had erred in making a final adjudication of the merits of the case. Then it was pointed out to the Georgia Supreme Court by both the Prosecutor and Counsel for Petitioners, in their respective Petitions for Rehearing that the trial Court was authorized to make a final adjudication because the parties had stipulated that the hearing before the trial judge to be the final determination on this matter and that no further hearings were contemplated. When the Georgia Supreme Court was confronted with this oversight on their part which made their opinion clearly erroneous, they filed a revised opinion on November 18, 1971 to replace the one originally filed in which they characterized the films in this case as "hard core pornography." and held it unprotected by the First and Fourteenth Amendments to the U.S. Constitution.

After filing their revised opinion, on November 18, 1971, they did on the same date deny both the Motions for Rehearing filed by Counsel for both sides. The original opinion, and the revised or corrected opinions of this Court are set forth in the Appendix.

It would appear that the Georgia Supreme Court when confronted with the first case in its history, where the trial judge after considering all the evidence and law in the case found the publications not obscene, could not leave the lower court decision standing and undertook on its own to rule the motion picture film obscene in the constitutional sense in the complete abscence of any evidence in the trial record or in the briefs and argument before it on which to base such highly unusual reversal of the said trial court. The only affirmative evidence adduced by the prosecution was that the Paris Adult Theatre I and II exhibited to adults only, no minors permitted on the premises and that a modest but polite forewarning was on the door to prevent potential intrusion into the privacy of unsuspecting adults who wished to avoid confrontation with erotic materials. Further, the only evidence before the trial Court and Supreme Court of Georgia demonstrated that there was no *Ginzburg*-type pandering involved in this case.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after that time, but it is significant to note a trend developed, which found fruition in 1967 in the case of *Redrup v. New York*, 386 U.S. 767 (1967). For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the First Amendment rights by Congress or by the state to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

The Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in the case, *Ginzburg v. United States*, 383 U.S. 463 (1966), that no obscenity conviction or suppression could follow. Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state, inferior and appellate courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.* The cases reversed are: *Austin v. Kentucky*, 386 U.S. 767 (1967); *Gent v. Arkansas*, 386 U.S. 767 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v.*

New York, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al. v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 806 (1971); *Wiener v. California*, 404 U.S. 988 (1971), *Hartstein v. Missouri*, 404 U.S. 988 (1971).

In none of the motion pictures involved, in none are there explicitly depicted sexual intercourse, fellatio, cunnilingus, or oral intercourse. The motion picture films are comparable to the matter depicted in *Burgin v. South Carolina, supra; Bloss v. Dykema, supra;* and *Wiener v. California, supra.*

From the rationale of the holdings of this Court, it is suggested that five very important principles emerge.

First, that "girlie" pictures and magazines of nude females in various poses as well as pictures and magazines of nude males and male and female, male and male, female and female, are not obscene in the constitutional sense absent the graphic depiction of explicit sexual acts.

The second principle is that all literary publications containing story lines illustrated or non-illustrated hard-cover or paperback are protected expression and conversely are not obscene in the constitutional sense.

The third principle is that pictorial portrayal on motion picture film of nudes either male or female together with suggested sexual congress or suggested variant sexual acts constitute protected expression under the *First Amendment*

absent actual depiction of these acts where no imagination is required to see the acts in progress, and where no pretense of artistic (social) value is demonstrated. That is, mere body movement or vocal utterances and the like, separate and combined, do not suffice to meet the test of obscenity. The film must show actual insertion or genital travel in the actual act of intercourse or sodomy, or actual act of cunnilingus or fellatio, absent a pretence of artistic (social) merit.

The fourth principle, and probably the most important, is that if the particular material meets the proscribable tests as set forth heretofore there may still be valid consideration sufficient to encompass the material under the protective umbrella of the *First Amendment* freedoms. This principle, often times referred to as "redeeming social value," is that the act performs a purpose within the context of the material and the work conveys an idea or attempts to convey an idea for the creator or to the recipient. Therefore, if in fact there is a modium of redeeming social value, the materials may not be proscribed.

The fifth principle lies in the manner of dissemination. Where materials are disseminated to willing adults in an adults-only environment, i.e., "adults only theatre" or "adults only bookstores" and not pandered or foisted upon an individual wishing to avoid confrontation with it or disseminated to juveniles, the materials are not proscribable.

Under controlling decisions of this Court, the motion picture films herein involved are not obscene in the constitutional sense, especially where, as here, none of the factors deemed important in *Redrup v. New York, supra,* are present.

2. THERE CANNOT BE A CONSTITUTIONALLY VALID JUDICIAL DETERMINATION OF OBSCENITY AS TO EACH OF THE FILMS BROUGHT BEFORE THE SUPREME COURT, CONSISTENT WITH PETITIONERS' RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THE ABSENCE OF ANY AFFIRMATIVE AND CONVINCING EVIDENCE ON EACH OF THE CONSTITUTIONALLY RELEVANT ELEMENTS OF THE STANDARDS FOR JUDGING PROSCRIBABLE OBSCENITY UNDER THE FIRST AMENDMENT.

Since obscenity prosecutions or injunctive proceedings, as in this case, are in themselves fraught with vagueness, the courts have held that in such prosecutions or proceedings, undertaken under a constitutionally permissible basis, the prosecution or in this case, the State of Georgiaa, has the affirmative responsibility to adduce appropriate evidence to establish each element of its concept of obscenity, including contemporary community standards.

In the state trial court below, the State of Georgia did not introduce a scintilla of evidence on the constitutionally required elements of obscenity. The State simply placed the instant films into evidence and then rested its case. The Georgia Supreme Court thereby condemned these films without any affirmative evidence of obscenity. The censorship of press materials without affirmative evidence, other than the films themselves, is no more than a misuse of the doctrine of *res ipsa loquitur*. This is error and a severe violation of *First*

Amendment rights. The following demonstrates the vital need for requiring affirmative evidence by the censor in all obscenity cases.

Recently, the Fifth Circuit Court of Appeals squarely faced the difficulties of protecting *First Amendment* freedoms in Federal obscenity prosecutions, where the Government merely put books into evidence and rested its case, without affirmative evidence on the elements of obscenity. In *U.S.A. v. Groner*, No. 71-1091 (Slip Opinion of January 11, 1972 – now pending EN BANC determination), the Fifth Circuit reversed a district court conviction for using a common carrier in interstate commerce to transport a quantity of alleged obscene books, in violation of *18 U.S.C. §1462:*

> "There remains little doubt that this Court is obligated to make an independent evaluation on the issue of whether the material in question is obscene. The issue of obscenity involves the application of first amendment rights to the printed word. The courts, not the reasonable jury or even the majority of reasonable men, are responsible for the protection of freedom of speech. The substantial evidence test, usually employed to reinforce jury verdicts, thus cannot be utilized to apply these constitutional doctrines.
>
> "We have little trouble in finding the books involved in the instant case to be vile, filthy, disgusting, vulgar, and, on the whole, quite uninteresting. We do, however, have difficulty in equating these adjectives with the constitutional definition of obscenity.
>
> "Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters. We are

completely incapable of applying the test in the instant case. Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature.

"Jurors in an obscenity case are called upon to determine contemporary community standards and must then compare the materials in question to determine whether they go 'substantially beyond the limits of candor' in describing sex or nudity. Each juror is an individual—separate in his morals, experience and taste. The only standards which govern his conduct and his judgment are his own, not those of the community as a whole, whether state-wide or national. Although such unfettered discretion is acceptable in determining questions of negligence, probable cause and intent, it has no place in determining whether material is to be armed with first amendment protection. We can come to no other conclusion under the circumstances.

"This Court finds itself in the same position as that of the jury in such a case. We cannot take judicial notice, without even a scintilla of evidence, of what constitutes the community standard of decency at this or any other time. If such a standard exists at all, we would expect that it would be in a constant evolutionary and even revolutionary flux, the fact of which militates against our exercising uninformed judgment at any particular point in time. At best it would be a matter of pure chance as to whether we as a Court, or an individual's left to our own devices and without the aid of evidence, could determine the correct standard.

"Moreover, we think evidence of the materials' prurient appeal was necessary. The material in the instant case does not appeal to the prurient interests of this Court. Indeed, we have trouble imagining its appealing to the prurient interests of any normal, sane, healthy individual. It is just too disgusting and revolting to be so classified. *To allow a case to go to a jury of layman under such circumstances is to invite the jurors' equating patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspicion about the prurient appeal of material to some known, undefined person whose psyche is not known. The possibility, even the probability, that jurors would be uncommonly sanctimonious or Puritanical in such a state of affairs should be obvious to anyone who has noted the numerous defeats of jury censors at the hands of the appellate courts.*

"We wish to make it perfectly clear what we hold, and what we fail to hold today in the instant case. We have expressed no opinion on the issue of whether the material involved here is or is not obscene. *In fact, our inability to do so is the basis for our holding that expert testimony is required on the elements of obscenity in order to furnish juries and this Court with an objective basis for deciding on the issue of first amendment rights." United States v. Groner, supra,* (Slip Opinion).

In *Groner*, the Fifth Circuit held that the "lowest common denominator", Slip Op., P. 5, n. 4, to be applied in determining whether material involved in an obscenity prosecution are obscene and constitutionally unprotectable are:

"1. Whether the materials, taken as a whole, appeal primarily to the prurient interests of the average adult [*Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304 (1957)];

> Whether the materials are patently offensive because they go substantially beyond the customary limits of candor in their description of sex and nudity [*Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432 (1962)];
>
> Whether the materials are utterly without redeeming social value [*Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676 (1964)]."
>
> (Emphasis and authorities added)
> (Slip Op., p. 5).

The application of the entire *Roth* progeny does not permit that "the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance", *Jacobellis v. Ohio*, 378 U.S. 184, 191, and the "three elements must coalesce", *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 977 (1966), to be established. See also, *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414. The second rule of the *Roth* progeny, *i.e.*, are the materials patently offensive because they go substantially beyond the customary limits of candor in their description of sex and nudity, has been expressed as the "contemporary community standards" aspect of the *Roth* progeny in *Manual*, 370 U.S. at 488, and *Jacobellis*, 378 U.S. at 192. See also, *United States v. Kennerly*, 209 F. 119, 121 (D.C.S.D. N.Y. 1913), when Judge Learned Hand first expressed the concept of "contemporary community standards", where he said:

> "* * * If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which *the community may have arrived here and now?* * * * ."
> (Emphasis added).

Manual, supra, was a case involving a ruling of the United States Post Office Department that barred from the mails a shipment of magazines; such ruling was based on alternative determinations that the magazines were nonmailable under two separate provisions of 18 U.S.C. §1461, a federal criminal statute, because the magazines (1) were themselves "obscene", and (2) gave information as to where obscene matter could be obtained, 370 U.S. at 479. *Manual* set forth the requirement that the contemporary community standards, which the materials patent offensiveness must go substantially beyond, is that of the "national" community. Justice Harlan announced the judgment of the Court, and Justice Stewart joined in the opinion. Justice Harlan, speaking with reference to the "contemporary community standards" aspect of the constitutional test of obscenity, pointed out that:

> "There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. *We think that the proper test* under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, *is a national standard of decency.* We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. Butler v. Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L.Ed. 2d 412." *Manual Enterprise, Inc. v. Day,* supra, at 488. (Emphasis supplied)

It would appear that Justice Harlan applied a "national contemporary community standards" test to those cases

involving an attempt at governmental censorship of materials under the purported authority of a federal statute, but *Jacobellis* clarified Justices Harlan and Stewart's position by mandating that a "national community" be the test of the "contemporary community standards" in any obscenity litigation. In *Jacobellis*, Justice Brennan announced the judgment of the Court and delivered an opinion in which Justice Goldberg joined. Justice Brennan wrote that any suggestion that the "contemporary community standards" aspect of the *Roth* test was to be determined by the standards of the particular local community, from which the case arose, was "an incorrect reading of *Roth.*" (378 U.S. 192). In reaffirming *Roth's* position to the effect that when determining the constitutional status of whether an allegedly obscene work offends "contemporary community standards", the basis of such a determination must be that of a "national standard", Justice Brennan said, 378 U.S. at 195:

> "It is, after all, a national constitution we are expounding."

This *rationale* is extremely logical and is required by the "Due Process of Law" concept under the Constitution of the United States, as exemplified by the following language of Justice Brennan in *Jacobellis*:

> "It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for

> application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' Pennekamp v. Florida, supra, 328 U.S. at 335, 66 S.Ct., at 1031, we see even less justification for allowing such limits to vary with town or county lines . . . "
> (378 U.S. at 194-195).

Thus there is no question that the "national contemporary community standards" is the proper framework of reference within which the determination that the materials are "patently offensive" must be made.

The foregoing discussion concerns itself with the evolvement of the constitutional standards for determining the obscenity of any material by employing "the lowest common denominator", *i.e.*, the *Roth* test, which the Fifth Circuit in *Groner* recognized as being the viable law in the "obscenity" area. The *Groner* Court, in pronouncing *Roth* as the test in the "obscenity" cases, recognized that:

> "Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters.***."
> (Slip Op., p. 6).

In *Groner*, the Court recognized that the *Roth* test cannot be correctly applied to any case by merely looking at the materials involved in relation to the language of the test of *Roth*. The *Roth* standards for judging "obscenity" are imprecise and inherently vague. Perhaps the most striking evidence of the truth of such a statement are the statements of various members of the Supreme Court itself with respect to their own inability to comprehend the meaning of the criteria enunciated by the Court.

In *Ginzburg v. United States*, 383 U.S. 463, 478-481, Justice Black made the following cogent observations:

> "... I think that the criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprise of the judge or jury which tries him. I shall separately discuss the three elements which a majority of the Court seems to consider material in proving obscenity.
>
> "(a) The first element considered necessary for determining obscenity is that the dominant theme of the material taken as a whole must appeal to the prurient interest in sex. It seems quite apparent to me that human beings, serving either as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual, be he judge or juror,

would reach about whether the material appeals to 'prurient interest in sex' would depend largely in the long run not upon testimony of witnesses such as can be given in ordinary criminal cases where conduct is under scrutiny, but would depend to a large extent upon the judge's or juror's personality, habits, inclinations, attitudes and other individual characteristics. In one community or in one courthouse a matter would be condemned as obscene under this so-called criterion but in another community, maybe only a few miles away, or in another courthouse in the same community, the material could be given a clean bill of health. In the final analysis the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time.

"(b) The second element for determining obscenity as it is described by my Brother BRENNAN is that the material must be 'patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.***' Nothing that I see in any position adopted by a majority of the Court today and nothing that has been said in previous opinions for the Court leaves me with any kind of certainty as to whether the 'community standards' referred to are world-wide, nation-wide, section-wide, state-wide, country-wide, precinct-wide or township-wide. But even if some definite areas were mentioned, who is capable of assessing 'community standards' on such a subject? Could one

expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California? So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held. And one must remember that the Federal Government has the power to try a man for mailing obscene matter in a court 3,000 miles from his home.

"(c) A third element which three of my Brethren think is required to establish obscenity is that the material must be 'utterly without redeeming social value.' This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is 'utterly without redeeming social value. ***' Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary.

"My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today."

In *Memoirs v. Massachusetts*, 383 U.S. 413, 453, Justice Harlan stated: "The central development that emerges from the aftermath of *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, is that no stable approach to the obscenity problem has yet been devised by this Court."

Chief Justice Warren stated in *Jacobellis v. Ohio*, 378 U.S. 184, 199-200:

"Recently this Court put its hand to the task of defining the term 'obscenity' in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed.2d 1498. The definition enunciated in that case has generated much legal speculation as well as further judicial interpretation by state and federal courts. It has also been relied upon by legislatures. Yet obscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes 'obscenity' and the question of what standards are permissible in enforcing proscriptions against obscene matter.

* * *

> "We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define 'obscenity.' "

In *Jacobellis, supra,* at 197, Justice Stewart stated:

> "It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed.2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the Fi rst and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

Even the trial judge below had extreme difficulty in his attempt to apply the imprecise and inherently vague standard for judging "obscenity". The State put on *no* affirmative evidence on the elements of obscenity; while Petitioner called a properly qualified expert witness (A. 65-83), who testified

that the films did not appeal to a "prurient interest" and did have redeeming social value. No evidence was ever presented on community standards. The confusion of the trial judge is best exemplified by his Order:

> *"Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene.* Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.
>
> *It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.*
>
> *IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene."*
> (A. 33-34) (Emphasis supplied.)

It is apparent that Judge Etheridge had extreme difficulty in understanding the tests for obscenity and then applying them to this case. His solution was one that should be of some assistance to this Court: He found the films not obscene, because the conduct and method of commercial

distribution was protected, and there was adequate notice to the public, with "reasonable protection against exposure of these films to minors". In effect, Judge Etheridge found that:

> "The display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the films to juveniles, is constitutionally protected."
> (This Court's Inquiry.)

It is clear that the same difficulty of discerning the meaning of the standards for judging "obscenity" exists in the academic world among law professors, legal writers, and law students throughout the Nation. In a very important sense, the bridge between judicial action and law students and lawyers lies in the extensive discussions which appear in the legal journals. In the case of the definition of "obscenity", the legal commentators have simply been unable to make any intelligent analysis of the standards and criteria for judging "obscenity". "The constitutional problems are primarily of two kinds. The first revolves around the ambiguity of the term 'obscenity' ... It may be possible to distinguish between degrees of explicitness in discussions of sex, but among explicit discussions of sex it is heroic to attempt to distinguish the good from the bad." Kalven, "The Metaphysics of the Law of Obscenity", 1960 Sup. Ct. Rev. 1, 2-3. "Not only do the cases between 1957 and 1965 demonstrate the difficulty of defining obscenity as the appeal to prurient interest, but they reveal that *Roth v. United States*, spawned a menagerie of vital subsidiary questions... The questions seem endless and many seem unanswerable... Another way to describe the fruits of the Supreme Court's labors in the vineyard of obscenity law is that it has produced five separate

and contradictory tests . . . The Court has turned the law of obscenity into a constitutional disaster area." Magrath, "The Obscenity Cases: Grapes of Roth," 1966 Sup. Ct. Rev. 7, 23, 56, 58. "We are driven to the conclusion that the verbal formula for obscenity approved by the Court in the *Roth-Alberts* opinion is not a single formula at all but one that embraces all of the current definitions of obscenity, including that of the Model Penal Code . . . These applications of whatever concept of obscenity the Justices have in mind suggest only what, in the minds of the Justices, obscenity is not; they tell us little of what the Justices think obscenity is." Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn.L.Rev. 5, 58-59 (1960).

The academic commentators are virtually all in the same vein. "There are few areas of constitutional law more confusing to lawyers and laymen than obscenity censorship . . . The confusion of the Justices was mirrored throughout the country in the plight of individuals and of public officials who had to live and work with the law." Morreale, "Obscenity: An Analysis and Statutory Proposal", 1969 Wisc.L.Rev. 421, 430. "Confronted with first amendment limitations, the Supreme Court has tried to distinguish regulatable from nonregulatable sexually-gratifying communication by censorious definitions that are inconsistent with each other and with first amendment values." Ratner, "The Social Importance of Prurient Interest-Obscenity Regulation v. Thought-Privacy", 42 So. Calif.L.Rev. 587 (1969). "The Court's definition of obscenity has caused problems because it has put the Court in the role of the nation's Super Censor. The judgments entailed in using the Court's definition are so subjective that it is virtually impossible for the lower courts to apply it with anything approaching uniformity." Karre, "Stanley v. Georgia: New Directions in Obscenity

Regulation?", 48 Tex.L.Rev. 646, 647 (1970). "The ultimate board of censors in the United States is the United States Supreme Court. Of course, there are millions of *ex officio* members that search the bookshelves and movie houses of the United States every day guarding the moral virtue of young and old alike. They do not know how to define 'obscenity,' but they know it when they see it. The Supreme Court in all honesty and with a great deal of pain and candor has labored for a definition of that perfidious word 'obscenity' and have 'white-washed' a nebulous concept that the masses are to use in their search." Carpenter, "Walton's Castle: The Spectrum of 'I Am Curious-Yellow'", 10 Washburn L.J. 163, 164 (1970). "Determining what is obscene today is virtually as uncertain a task as it was prior to *Roth.*" Eich, "From Ulysses to Portnoy: A Pornography Primer", 53 Marq.L.Rev. 155, 165 (1970). "The tests which have evolved are not clear-cut; it appears that a majority of the Supreme Court has yet to agree upon a single definition of 'obscenity.'" Dunaj, "Private Possession of Obscene Films Where There is No Intent to Sell, Circulate or Distribute," 24 U.Miami L.Rev. 179, 180 (1969). "But aside from the questions about the constitutional soundness of the obscenity definition in *Roth-Alberts,* there is the additional problem raised by the meaning of that definition. Stripped of its rhetoric, the *Roth* definition appears to signify merely that a work will be legally obscene if the triers of fact – the jury or the judge – decide that in their opinion it is obscene. The fact of the matter is that obscenity is probably one of those concepts inherently incapable of meaningful definition." Kanowitz, "Love Lust in New Mexico and The Emerging Law of Obscenity", 10 Natural Resources J. 339, 344 (1970).

Because of the lack of unintelligible standards and criteria for judging "obscenity", prosecutors, police officers, the press,

the public, and even judges, have approached issues of "obscenity" subjectively, moralistically, and emtotionally, rather than scientifically and objectively. The vagueness, ambiguity and uncertainty of the standards have led to lawlessness in the enforcement of the law by public officials and censorial activities by private organizations, which have caused direct and immediate harm to many individuals throughout the country. Moreover, this has led to deprivation of large segments of the population of the right of access to books, films, magazines, and other media of communication.

In *Groner*, the Court correctly recongized the morass of legal confusion in applying the *Roth* test's imprecision and inherent vagueness to materials without the aid of expert testimony, as exemplified by their holding that:

> "... Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature."
>
> (Slip Op., p. 6).

The same principle was enunciated in *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965), where the Second Circuit, recognizing that the defendant, out of apparent necessity, had made no claim that the material in question had any redeeming social, artistic or literary value whatsoever, nevertheless held that the lack of expert testimony on the

issues of prurient appeal and community standards was fatal to the prosecution.

Other courts have struggled with this problem of the need for affirmative evidence, as demonstrated by the following quotations:

(a) In Re *Giannini*, 72 Cal. Rptr. 655 (1968) the Supreme Court of California stated in pertinent part:

> "We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency . . . To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene or offensive to the particular juror . . . We conclude that the judgment must be vacated for lack of evidence as to whether applying contemporary community standards petitioner Isler's dance appealed to the prurient interests of the audience and offended accepted standards of decency."

(b) The Supreme Court of the Commonwealth of Virginia likewise has held in the case of *House v. Commonwealth*, 169 S.E.2d 572 (1969), reported on September 5, 1969, on this issue as follows:

> "In the first place there is no evidence that according to or applying contemporary community standards the dominant theme of the magazines in question appealed the prurient interest of the reader or that they were patently offensive because they affronted contemporary community standards relating to the

description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the description of such matters.

. . . . . .

As to the sufficiency of the evidence, we agree with the defendant that since the statute provides punishment for 'every person who knowingly . . . commercially distributes . . . any obscene matter, the burden was on the Commonwealth to show that the magazines were obscene and that the defendant knew they were obscene when he distributed them to retain dealer Sweraky . . . In accord with this view we hold that in the absence of evidence that these magazines affronted the standards of the community, the evidence on behalf of the Commonwealth was insufficient to sustain the conviction of the defendant."

(c) The Supreme Court of the Commonwealth of Pennsylvania recently considered this issue in *Duggan v. Guild Theatre, Inc., et al,* 258 A.2d 865 (1969), and said in pertinent part as follows:

"Nor has the district attorney proved that this movie 'affronts contemporary community standards' relating to the representation of sexual matters. Each one of his witnesses called to testify as to community standards admitted that they had no idea what these standards were. The district attorney in his brief admits that he produced no expert testimony on this issue, yet urges us to find that the mie affronts contemporary standards. This we cannot do. Courts of law are not capable of deciding what

contemporary standards are, without the benefit of any evidence whatsoever. Cf. *Dell Publications*, 427 Pa. at 193, 223 A.2d at 843.

"As for the third independent test, the district attorney has not proved 'Therese and Isabelle' to be utterly without redeeming social value . . . .

"Thus the Commonwealth has not shown, under any one of the three independent standards set forth in *Memoirs* and *Dell Publications* that 'Therese and Isabelle' is constitutionally obscene."

(d) *Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332:

"Where the transcedent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325, *supra*.

"The vice of the present procedure is that, where particular speech fails to close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis v. United States*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857, *supra*, provide but shifting sands on which the litigant must maintain his position."

(e) *Smith v. California*, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215, concurring Opinion of Justice Frankfurter:

> "...[F]or community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude as irrelevant evidence that goes to the very essence of the defense and therefor to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patent ability of a controverted device.
>
> "There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. There interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personel [sic] upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary

community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859?"

(f) *People v. Rosakos*, 74 Cal. Rptr. 34 at 36 (1968):

"This case must be reversed for a second reason, which is the holding in In re Giannini and Iser, 69 A.C. 588, 72 Cal. Rptr. 655, 446 P. 2d 535.

"In that case the court was dealing with violations of Penal Code Section 314, subdivision (1) and Penal Code Section 647, subdivision (a). (The alleged offenses occurred in the presentation of a dance before an audience. The court in that case affords the dance *First Amendment* protection unless the dance is obscene. In order to determine whether or not the dance was obscene the court holds at page 599, 72 Cal. Rptr. at page 662, 446 P.2d at page 542, . . . a finding of offensiveness to the accepted community standards of decency forms a prerequisite to a conclusion of obscenity,' and the court further states at pages 599-600, 72 Cal. Rptr. at page 663, 446 P.2d at page 543:

"Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards.

"We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards.

"(2) In the case at bar no evidence of community standards was introduced. We therefore hold that the evidence is insufficient on the present record to sustain the conviction as to count VII.

"The judgment is reversed."

(g) *United States v. Klaw*, 350 F.2d 155 (1965):

"Nor is mere 'patent offensiveness' enough. There must in addition be the requisite prurient appeal. Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? judge by whom? on what basis? For example, is it the average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or do they operate to establish that some 'redeeming social importance' is present? Or do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme' indicate that the prospective prurient appeal is great or slight, or does it suggest that other themes will supply the redeeming social importance? Perhaps the *Roth* statement is too compact—an unsurprising failing in an initial formulation, the Court itself has acknowledged that it 'is not perfect.' *Jacobellis v. Ohio, supra*, 378 U.S. at 191, 84 S.Ct. 1676. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp.

"Having in mind the constitutional constrictions on the breadth of legislation affecting the freedom of expression, if appeal to prurient interest—on either an 'average man' or a 'deviant typical recipient' basis—is the statutory concern, then it seems desirable, indeed essential, that such appeal to someone be shown to exist. This the Government's view of *Roth* does not require. Nor should it be sufficient merely that the disseminator or publicizer things such appeal exists. The stimulation and reaction with which the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the 'obscenity' laws do not seem best calculated to cope with him. Moreover, the Court stresses in *Roth* the 'effect' of the material on the people reached by it. See 354 U.S. at 490, 77 S.Ct. 1304.

"... And if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a devient segment of society whose reactions are hardly a matter of common knowledge.

. . . . . .

"However, some proof should be offered to demonstrate such appeal, thereby supplying the fact finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in Klaw's troubles

with the postal censors, 'obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence.' *Klaw v. Schaffer, supra*, 151 F.Supp. at 539 n.6; see *Manual Enterprises, Inc. v. Day*, 110 U.S. App. D.C. 78, 289 F.2d 455 (1961, rev'd, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962)).

"In this case, although Judge Wyatt wisely suggested, and the Government considered, introduction of such evidence, there was none. Because of this Judge Wyatt stated at the end of the case, as he had to, that there was no 'evidence from which the jury could find that it (Nutrix materials) would in fact appeal to the prurient interest of a particular class.'

"Furthermore, nothing in the record shows that the material even has prurient appeal to the average man.

"... In this case, however, the only predicate for any conclusion about prurient appeal was the material itself, as if *res ipsa loquitur*. The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.' "

(h) *Commonwealth v. Dell Publications, Inc.*, 233 A.2d 840 (1967):

"In the instant litigation, however, both the comments made during the hearing and the formal adjudication indicate that the hearing judge proceeded on the premise that, in the final analysis, his own subjective reaction, and and by itself, was the

determining factor. As the law of obscenity now stands the judge's subjective analysis is of course relevant to the ultimate issue, but the mere donning of judicial robes does not make us the embodiment of the 'average person' nor do our tastes necessarily parallel those of the 'contemporary community.'

"The totally subjective approach adopted by the court below was palpable error.

. . . . . .

"A. Appeal to Prurient Interest. This is perhaps the most difficult of the three elements to define. What appeals to the prurient interest of one individual may not appeal to the prurient interest of another. Some cases may pose a problem of group definition, but it is conceded that 'Candy's' appeal is to the community at large and thus we must judge its prurient appeal to the 'average person.'

"Unfortunately, there was practically no testimony offered concerning 'Candy's' appeal to the prurient interest of the average adult citizen.

"The Commonwealth presented practically no evidence whatsoever concerning 'Candy's' relationship to contemporary community standards."

(i) *Dunn v. Maryland State Board of Censors*, 213 A.2d 751 (1965):

"In the present instance the Board did no more than offer the film; it produced no other evidence whatever. We think it plain that save in the rare case where there could be no doubt that the film is obscene the Board will not meet the burden of persuasion imposed on it by the Constitution and the

statute without offering testimony that the picture is obscene in that (a) the average person, applying community standards, would find that its dominant theme, taken as a whole, appeals to prurient interests, (b) that the film goes substantially beyond customary limits of candor in description or representation of sex or other matters dealt with, and (c) that it is subject to proscription because it is utterly without redeeming social importance considered in light of the fact that '... sex and obscenity are not synonymous, *Roth,* U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498, 1508, and the fact that material dealing with sex in a manner that advocates ideas or has literary, scientific or artistic value or any other form of social importance may not be branded as obscenity. In our view, neither the judge who may sit in the circuit court to review the adtion of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points."

(j) *Hudson v. United States,* 234 A.2d 903 (1967):

"Where the material involved is not patently obscene, neither a judge nor twelve local jurors chosen at random are capable of determining the standards of tolerance prevalent in the nation generally without first being given some competent evidence of what those standards are. *United States v. Klaw,* 350 F.2d 155, 168 n. 14 (2d Cir. 1965). A guilty verdict is an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. If a case is submitted to the trier of fact without first establishing the community standards by competent evidence to which the trier may refer, the verdict at best will be based on the

prevailing customs in a limited geographical area and, at worse, upon the 'subjective reflection of taste or oral outlook of individual jurors or individual judges. . . .' [T]he determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or the particular experience of life, but on the basis of 'contemporary community standards.' *Smith v. People of State of California*, 361 U.S. 147, 165, 80 S.Ct. 215, 225, 4 L.Ed.2d 205 (1959), concurring opinion of Mr. Justice Frankfurter. These standards must be established by relevant evidence at trial.

"Since the prosecution in the present case had the burden of proving relevant community standards prevailing in the nation generally and elected not to do so, we hold that the Government failed to establish an essential element of the crime charged and the verdicts of guilty were therefore in error."

See also *Ramirez v. State*, 430 P.2d 826 (1967), and *City of Phoenix v. Fine*, 420 P.2d 26 (1966).

". . . [W]e reverse on the ground that the state has failed on any conceivable basis to prove its case. Here, as will be recalled, the only evidentiary predicate for the conclusion that the publications are obscene under any of the views expressed in Redrup are the publications themselves. Apparently, the prosecution believes that a theory [sic] akin to *res ipsa loquitur* applies to obscenity cases, and that no evidence other than the presentation of the magazines is required in order to establish a violation of the statutory and constitutional standards."

(k) And recently the Court of Special Appeals of Maryland in the matter styled *Woodruff v. State*, 237 A.2d 436, his Honor, Judge Moylan appropriately stated:

> "In measuring then the prurient appeal of this theme, we must do so in terms of a particular audience. *There was no evidence in this case to indicate that, under Mishkin, it was 'designed for or primarily disseminated to a clearly-defined deviant sexual group.'* We must, therefore, measure prurience in terms of its appearance to the average person. (Emphasis added.)
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> . . . . . .
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> "It is axiomatic that to judge whether something offends contemporary community standards, one must know what those contemporary community standards are. In this case, the State neither showed nor offered any evidence whatsoever as to the standards prevailing in Prince George's County, the State of Maryland or the United States, whichever of those communities will ultimately be deemed the appropriate 'community.' *Jacobellis v. Ohio, supra.* By way of defense, the appellant did make two abortive attempts to offer testimony as to the prevailing community standards, at least within Prince George's County.
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> . . . . . .
>
> "This failure of the trial court to afford the appellant an opportunity to prove what he believed to be the prevailing community standard is not material, however, in view of our belief that the State failed utterly to make even a *prima facie* showing of any community standard whatsoever. We feel, as did Judge Orth in his concurring opinion in *Dillingham v. State, supra,* 9 Md. App. at 715, 267 A.2d at 801:

'I cannot determine from the record whether or not the material affronts contemporary community standards relating to the description or representation of sexual matters. The State, as the opinion of the Courts points out, did not prove what the contemporary community standards are, either national or local. . . . It is not possible to determine that the material here affronted contemporary community standards when the standards themselves are not delineated. Thus, the second element was not proved and this alone would be good reason to reverse the conviction.'

. . . . . .

"In making our own independent, reflective judgment upon the material, we feel that the view expressed by Judge (now Chief Judge) Hammond in *Dunn v. Maryland State Board of Censors, supra,* 240 Md. at 255, 213 A.2d at 754, even though dealing with alleged obsenity in the context of motion picture censorship, is pertinent:

'In our view, neither the judge who may sit in the circuit court to review the action of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded those constitutional standards or tests without enlightening testimony on these points.'

. . . . . .

"Even were the material before us obscene by any test, however, the conviction of the appellant here would have to be reversed because of the utter failure of the State to show any evidence of *scienter* on his part as required by *Smith v. California.*"

The application of the *Roth* test by a trier of fact, either court or jury, to any given material, is an impossible task, when such application occurs only by introduction of the materials in question and a presentation of the *Roth* language in the charge of the Court, without any testimony as to the meaning of the language presented as related to the questioned materials. There must be expert testimony presented by the censor to make the language of the *Roth* test meaningful to the trier of fact.

The assertion, that the mere introduction of materials is the only evidence necessary to meet the *Roth* standard and satisfy its burden of proof, cannot be sustained in light of the foregoing authorities and logical reasoning as such relate to the imprecision of the *Roth* standard, *per se*, and application of the same by the trier of fact to any given material. A logical look at the different elements of the *Roth* test and the problems with having the trier of fact apply it in terms of the language to any material, without the aid of experts as to the meaning of such language, will support this contention:

First: A logical consideration of "whether the materials, taken as a whole, appeal primarily to the prurient interests of the average adult" element, and why expert testimony on this element is needed, is presented. *Roth* defined "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion" (354 U.S. at 487, n.20). It is apparent that a "morbid or shameful interest" is different in each age group, *i.e.*, 20 years old vs. 60 years old, each ethnic group, each religious group, each economic-status group, etc., *ad infinitum*. Who can say that the materials "appeal primarily" to "prurient interest" (whatever that is)? What is a "morbid

or shameful interest", and how are we to know such an interest is even present in the "average adult" (once it is determined what physical, physiological, psychological, and emotional characteristics can be said to be that of an "average adult")? The writers are not qualified to answer these questions, and, as shown by the aforementioned authorities – legal, public and scholarly – which are, at best, contradictory in their terms as to the application and meaning of *Roth*, neither are the triers of fact; be they court or jury. The very basic problem is that lawyers, judges and jurors are not experts in the required fields of knowledge necessary to apply the imprecise and abstract standards of *Roth* to any given material. Only "experts", who have the expertise and knowledge necessary to give meaning to the abstract terminology of *Roth*, and the proper application of such to the materials in question, can supply the trier of fact with any sound, legal and logical bases upon which to reach a well-founded decision. Failure to provide such expert testimony is an invitation: (1) to allow the trier of fact to equate that which may be repugnant or distasteful to a particular individual with "prurient appeal" of an unknown psyche; (2) to allow jurors to become uncommonly sanctimonious or puritanical, albeit hypocritically in a number of instances, and suppress materials absent an objective basis to warrant this type of juror censorship; and (3) to allow prosecutors the right to obtain a conviction in a criminal case on a *res ipsa loquitur* theory by merely introducing the materials into evidence for the jury to peruse, thereby enabling each individual juror to use his own personal, subjective discretion, by mere speculation and suspicion, in deciding what is a "morbid, shameful interest in nudity, sex and excretion" of the average adult. Thus, expert testimony is

required as an essential part of the evidence necessary to establish the elements of obscenity, whether the materials in question deal with heterosexual activities or activities of a deviant sexual group, such evidence being the only method of providing an *objective* basis, rather than a *subjective* one, upon which the fact-finder can reach a verdict.

Second is the contention, logically speaking, that expert testimony is required on the "whether the materials in question go substantially beyond the limits of candor in describing sex or nudity according to the national contemporary community standards" element of *Roth*.

It is unrealistic to assume that twelve people on a jury will know what is the "national contemporary community standard" reference point concerning different types of materials, alleged to be obscene. Also, how can individual jurors or judges properly apply a charge on "national contemporary community standards" without expert testimony as to those facts that would comprise a violation of the appropriate community standard?

Thus, expert testimony is required, in all cases, to establish how the materials in question violate the "national contemporary community standards." Absent such testimony the jurors will be allowed to ascertain that the materials in question are obscene on a subjective reflection of the taste or moral outlook of the individual jurors. This is error, because such a decision should be based on an objective reflection, supported by competent evidence offered by the state censor in the form of "expert testimony", and not assume that jurors necessarily express or reflect national community

standards. See, *United States v. Klaw, supra; In re Giannini, supra;* and *Luros v. United States, supra.*

Expert testimony is further required, once there has been an alleged "violation of national contemporary community standards", to establish the other part of this particular element, *i.e.*, "do the materials in question go substantially beyond the limits of candor in describing sex or nudity?", because the individual juror governs his conduct and morals by his own standards, not those of the community as a whole, and a juror should not have the discretion to make a personal judgment, based on his own standards, as to whether the material is or is not to be armed with First Amendment protection. The problem, requiring expert testimony as a solution, is apparent when a local jury is applying a "national contemporary community standard" to the question of whether the materials go beyond the customary limits of candor in the Nation.

Third is the logical contention that expert testimony is required to prove "the materials are utterly without redeeming social value" element of *Roth*. This very language illustrates the obviousness of the necessity for experts. There are numerous "social values" within our Nation, and only expert testimony can lend any credence to the proposition that any particular material is "utterly without" the "redeeming social value" that would cloak the material with First Amendment protection. Lawyers, judges and jurors are just not qualified to make the decision that any materials do not have some artistic, literary, historical, entertaining, informative, educational, etc., *ad infinitim*, value, so as to amount to that material which does not have First Amendment protection and is thus proscribable.

This is particularly true when it is realized that there are numerous changes in "social value", and their order of interest and importance within the Nation as a whole, taking place every day. It is respectfully submitted that, as an example, this Court can consider the increasing interest in matters relating to human sexual activities such as (a) the Kinsey Report, (b) the present-day "sexual revolution", (c) the increasing interest in obtaining materials that portrays the different techniques and methods by which one can give to or obtain from another sexual gratification, (d) the relaxation of archaic laws pertaining to sexual acts performed in a private environment between consenting adults, and (e) the reaffirmation of the personal right to read and view any material an adult person may wish when it is within the privacy of one's home. Thus, a change in "social value" relating to sexual matters has definitely taken place within the Nation.

It is respectfully submitted that in prosecutions to any sex-oriented materials, expert testimony on the fact that the materials in question are utterly without redeeming social value under present day societal-sex oriented standards, without consideration of the numerous other "social value" aspects that any particular material may have, is needed for the trier of fact to reach a well-founded and logical decision. Evidence of this contention is ample in light of the numerous *per curiam* reversals (see, *Roth*, or *Redrup* and its progeny) rendered by the Supreme Court since 1957.

The above clearly points to the fact that expert testimony is required in the area of obscenity prosecutions. Cf., *Smith v. California*, 361 U.S. 147, 180 (J. Frankfurter, concurring, and

requiring experts on contemporary community standards); *United States v. Alexander*, 428 F.2d 1169, 1174, n. 7 (8 Cir. 1970) (where the reference is to the divergent opinions as to what is or is not "hard-core-pornography"), which exemplifies the fact that in all cases expert testimony on the elements of the obscenity of the questioned materials is required, because the courts, lawyers, jurors, magistrates, and police officers just do not know what materials are outside the protection of the First Amendment guarantees.

There is yet another reason why expert testimony is required in obscenity prosecutions: failure to require the governmental censor to prove every element of the offense with which a defendant has been charged is a violation of the defendant's rights to due process of law and, in cases involving First Amendment implications, this requirement should be even more strictly applied.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 526; *Freedman v. Maryland*, 380 U.S. 51; *New York Times Co. v. Sullivan*, 376 U.S. 254, 271, 277-280, 283-288; *Thompson v. City of Louisville*, 362 U.S. 199, 206; *Smith v. California*, 361 U.S. 147.

Permitting suppression and punishment without proof of the essential ingredients of an offense, ingredients which are made necessary by the requirements of the Constitution, undermines a broad category of rights guaranteed by the free speech, press, and due process provisions of the Constitution. The right to fair notice and hearing, the right of

confrontation of witnesses, and the assistance of counsel are meaningless and constitute a mere gloss when the prosecution is not required to prove the elements of an offense. *Pointer v. Texas*, 380 U.S. 400; *Douglas v. Alabama*, 380 U.S. 415; *Brookhart v. Janis*, 384 U.S. 1; *Turner v. Louisiana*, 379 U.S. 466. Without proof of the elements of the offense of obscenity, "it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." *United States v. Klaw*, 350 F.2d at 170.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly without redeeming social value, can only be established by evidence and not by conjectures, presumptions or subjective reactions. *Tot v. United States*, 319 U.S. 463; *New York Times Co. v. Sullivan*, 376 U.S. 254; *United States v. Romano*, 382 U.S. 136. As this Court has warned on different occasions, and as the Court of Appeals of the Second Circuit made clear in *Klaw*, *supra*, courts and juries in obscenity prosecutions do not sit to act as censors of material personally objectional to them.

Without proof of evidence, reviewable by an appellate court, to determine if limits of candor have actually been exceeded, or that a writing appeals to no other interest but prurient interest, or is without any social importance at all, there is little assurance, it is submitted, that nonobscene

writings can be protected. As was stated by the Court of Appeals in *Klaw*, "it is the record and not our feelings that must control . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscenity." 350 F.2d at 170. The volume of obscenity cases already disposed of by this Court with Reversals, and the volume of cases now before this Court, is ample evidence that the "witch hunt" has already developed into advance stages.

The State's failure to introduce expert testimony on each element of the offense shifts the burden of proof to the defendant to prove the nonobscenity of the materials in question. It is an erroneous contention and a misapplication of the law to say that if the defendant in a obscenity case puts on evidence as to the three elements of obscenity in order to get a nonobscenity holding, the State does then not have to put on any evidence. This contention is in violation of all constitutional principles of due process in that it is a complete shifting of the requirements of the burden of proof and such requirements are never supposed to shift; *i.e.*, the censor has the burden of proof to put on evidence as to the elements of all offenses, and this burden never shifts but rather it extends throughout the whole trial. See, *Gojack v. United States*, 384 U.S. 702, 86 S.Ct. 1689, 1693. The accused is not to be convicted unless the prosecution "shoulder the entire load". See, *Tehan v. Shott*, 382 U.S. 406, 415; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 1620; *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 1831; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965).

The other aspect of the contention that no expert testimony need be presented, but only the materials need be

introduced into evidence, is the application of a *res ipsa loquitur* - negligence approach to an obscenity prosecution, whether criminal or civil. It is respectfully submitted that there is no conceivable way that the tort-negligence area of the law can be applied to the obscenity-criminal or civil prosecutions. This contention is based on two propositions:

1) While in every criminal case all elements of the offense must be proved and the negligence standard, as applied in a criminal case, is based on that type of conduct which people are in contact with on an every-day basis; *e.g.*, one person, as an average man, will know the driving habits of another person in a negligent-homocide case when the defendant has been driving 75 miles per hour into a crowd of people, because it is presumed that a reasonable man would know that high rate of speed would injure or kill some person in the crowd.

The obscenity area of the law is not that area which can be based on a "reasonable man" standard, because this area is more of an idea than an every-day standard of living; and a reasonable man needs expert testimony to prove, beyond a reasonable doubt, the three-pronged test of obscenity, because he does not have contact with these three elements in every-day living as he does in a negligence case.

Evidence of this proposition is shown by a review of the cases where the materials were merely presented to the jury without expert testimony on the necessary elements of obscenity, and were reversed by the Supreme Court.

2) The standard of that burden of proof which is required in any prosecution is completely different from the burden of proof required in civil litigation, such as the negligence area. The prosecution of a criminal case must prove its position, beyond a reasonable doubt, before the jury can render a guilty verdict, but the plaintiff in a civil case need only prove its position "by a preponderance of the evidence" before the jury can hold the defendant liable due to his alleged negligence. It is respectfully submitted that this operates as a denial of a due process of law.

The inherent guarantees of the United States Constitution mandates even further reason why expert testimony is required in an obscenity prosecution. First are those rights and guarantees as provided by the First Amendment freedoms, which have previously been discussed herein. Second is the defendant's right to confront witnesses and assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution. Thus, the mere introduction of allegedly obscene materials does not provide the defendant with his constitutional right to confront witnesses, and further nullifies any possibility of cross-examination, since materials cannot be cross-examined. There is no effective assistance of counsel in this type of

obscenity prosecution, because counsel has had no opportunity to be effective. The *scienter* requirement in an obscenity prosecution is mandatory and the mere introduction of the allegedly obscene materials does not satisfy this mandate and violates the First, Fourth, Fifth, Sixth and Fourteenth Amendments.

The entire proceeding in this manner deletes any proper judicial hearing upon which the defendant's rights to due process of law, could be said to have been predicated.

It is recognized that each court is obligated to make an evaluation on the issue of whether the materials are obscene. See, *Jacobellis v. Ohio*, 378 U.S. 184; *Napue v. Illinois*, 360 U.S. 264; *Haldeman v. United States*, 340 F.2d 59 (10 Cir. 1965); *Kahm v. United States*, 300 F.2d 78 (5 Cir. 1962); *In re Giannini*, 446 P.2d 535 (Calif. 1968); *Hudson v. United States*, 234 A.2d 903 (D.C. Ct. App. 1967); *U.S.A. v. Groner*, *supra*

This independent evaluation must be made at some stage of the proceedings prior to the actual trial on the merits or, if such evaluation is made at the appellate level, prior to the actual review of the trial court's record of the proceedings. Each court, in making this independent determination, must compare the allegedly obscene materials involved in the instant prosecution with those materials that have received a prior judicial determination of nonobscenity. After making this comparison, the court must decide whether to proceed or dismiss. Should the court decide to proceed in the normal course of the proceedings expert testimony must be required by the court to explain the differences between the comparable materials and those involved in the censorship attempt. It is respectfully submitted that no court can apply

the three-pronged test of *Roth* to any given material and, more particularly, apply said test in good conscience after making the required comparison. Thus, expert testimony is necessary for a trier of fact or appellate court review, in order that the absence or presence of the elements of obscenity can be applied to the materials in question when compared with the materials that have received prior judicial determinations of nonobscenity by this Court and other federal and state courts.

Thus, it is respectfully submitted that this Court should require expert testimony in all obscenity cases, whether civil or criminal, because without expert testimony there is no foundation upon which to reach any reasonable and just verdict. This proposition, it is submitted, is elementary in light of the basic principle that in other types of criminal prosecutions all elements of the offense must be proved, and in an obscenity prosecution the First Amendment implications put an even more stringent burden on the censor to prove the elements of the offense. As an example, in the case of a criminal prosecution for the illegal importation of heroin, the prosecution must prove that the defendant had the heroin in his possession, that he knew it was heroin, that he intended to import it illegally, and that the contraband was in fact heroin, which can only be proved by "expert testimony", *e.g.*, a chemist-toxicologist that administered the chemical test evidencing a "positive" result that the contraband was heroin. Why reduce this type of requirement in a "contraband" criminal prosecution to that of "no evidence is necessary on the elements of obscenity" in an obscenity prosecution? "Heroin" has no presumption of constitutional protection, but conduct and materials relating to speech and press is

presumed protected by the First Amendment. Therefore, the censor must introduce expert testimony to rebut this presumption of First Amendment protection. Public policy dictates even greater court-procedural safeguards in the obscenity area than those of the other classifications of criminal prosecution, because a mistake by the fact-finder in an obscenity prosecution harms not only the defendant but also the national population as a whole, by suppressing thoughts and ideas to which the public would ordinarily be entitled. See, *Speiser, supra.*

3. THE STATE OF GEORGIA MAY NOT, CONSISTENT WITH THE FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, UTILIZE *AD HOC* PROCEDURES TO ENJOIN DISSEMINATION OF PRESUMPTIVELY PROTECTED FIRST AMENDMENT MATERIALS WHERE THERE IS NO STATUTORY PROCEDURE OR AUTHORITATIVE JUDICIAL DECISION AUTHORIZING THE SAME WITH APPROPRIATE PROVISIONAL SAFEGUARDS.

This Court did not consider constitutional aspects of alleged obscenity and the application of the *First Amendment* thereto until 1957, when it decided at the same time two (2) cases.

The first case related to the procedure, lawfully to be employed by States in restraining the dissemination of alleged obscenity. This case was styled, *Kingsley Books, Inc. v. Brown, 354 U.S. 436* (1957), wherein this Court sustained the

facial constitutionality of a state statute as construed which permitted the institution by the State of New York of proceedings seeking injunctive relief after "adversary judicial hearings" designed to "focus searchingly" on the issue of obscenity. The statutory procedure in New York postponed *any restraint* until a judicial determination of obscenity following notice and an adversary hearing. The statute by its terms provides for a hearing one day after joinder of issue and the judge must hand down his decision within two days after termination of the hearing.

The Court in its concluding comments in *Kingsley Books, Inc. v. Brown, supra,* stated:

> "... Section 22-a is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive."

The Court on the same day decided the question in the abstract as whether, in essence, obscenity is under all circumstances within the ambit of the *First Amendment,* and the Court in *Roth v. United States of America, 354 U.S. 476* (1957) held that under all circumstances, obscenity cannot be said to be absolutely protected by the mantle of the *First Amendment.* The Court went on to warn that the permissible limits of state and/or Federal power to deal with obscenity are severely restricted and stated at *page 488,*

> "Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent

encroachment upon more important interests. *It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.*" (Emphasis supplied.)

The next case of import wherein the Court dealt with procedural requirements in obscenity litigation, involved the case of *Smith v. People of the State of California, 361 U.S. 147* (1959) wherein the Court held that the City Ordinance was unconstitutional for failure to require by its terms as construed for scienter, and did so by virtue of the due process clause of the Fourteenth Amendment to the Constitution.

The Court's rationale for striking down the unconstitutional ordinance was stated in part as follows:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. . . .And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

In 1961, the Court again considered the issues of procedural due process in the area of the exercise of *First*

Amendment freedoms when it ruled in *Marcus v. Search Warrant, 367 U.S. 717* as follows:

"...It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.

...

"We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. (Emphasis Supplied.)

...

"...*Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.* (Emphasis Supplied.)

...

"...Finally, a subdivision of the New York statute in Kingsley Books required that a judicial decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction. In contrast, *the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity."* (Emphasis Supplied.)

The Court thus in effect severely critized the Missouri statutory procedure, which it held in essence was unconstitutional as construed in the context of the case at bar.

The Court in arriving at its decision in *Marcus* cited in support its language in *Speiser v. Randall, 357 U.S. 513* (1958) where it said:

> "As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn... The separation of legitimate from illegitimate speech calls for more sensitive tools that California has supplied."

The next case considering the issue of rigid procedural safeguards as being required in the area of *First Amendment* freedoms was *Bantam Books, Inc. v. Sullivan, et al., 372 U.S. 58* (1963), where the Court in discussing the issue stated:

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech. *Marcus v. Search Warrant of Property, 367 U.S. 717, 730, 731, 6 L ed 2d 1127, 1135, 1136, 81 S. Ct. 1708.*
>
> Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of

expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California, 361 U.S. 147, 4 L ed 2d 205, 80 S. Ct. 215; Marcus v. Search Warrant of Property,* (U.S.) *supra,* is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.[10] Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. See *Near v. Minnesota, 283 U.S. 697.*

(Footnote 10) "Nothing in the Court's opinion in *Times Film Corp. v. Chicago, 365 U.S. 43, 5 L ed 2d 403, 81 S. Ct. 391,* is inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.* In declining to hold prior restraints unconstitutional per se, the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures."

The next case of import to be decided by this Court relating to the requirements of procedural due process in the context of First Amendment Freedoms was *A Quantity of Copies of Books, et al. v. Kansas, 378 U.S. 205* (1964), wherein the Court struck down the statutory procedure followed by the State of Kansas, and held in part as follows:

"...We conclude that the procedures followed in issuing the warrant for the seizure of the books, and

authorizing their impounding pending hearing, were constitutionally insufficient because they did not adequately safeguard against the suppression of non-obscene books. For this reason we think the judgment must be reversed. . .

. . .

". . .It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech. See also *Smith v. California, 361 U.S. 147, 152-153, 4 L ed 2d 205, 210, 211, 80 S. Ct. 215.*

"Nor is the order under review saved because, after all 1,715 copies were seized and removed from circulation, P-K News Service was afforded a full hearing on the question of the obscenity of the novels. For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books. *Bantam Books v. Sullivan, supra; Roth v. United States, 354 U.S. 476, 1 L ed 2d 1498, 77 S. Ct. 1304; Marcus v. Search Warrant, supra; Smith v. California, supra.* Here, as in *Marcus*, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' 367 U.S. at 738, 6 L ed 2d at 1140, the judgment resting on a finding of obscenity must be reversed."

As indicated in a footnote quoted from the case of *Bantam Books, Inc. v. Sullivan, supra*, the Supreme Court had earlier considered the issue of whether under all circumstances, "prior restraint" was necessarily

unconstitutional with reference to motion pictures. In declining to hold prior restraints unconstitutional per se, the Court did not uphold the constitutionality of any specific such restraint. In a case decided in 1965, the Court held unconstitutional a specific statutory procedure for restraint in a case entitled *Freedman v. State of Maryland, 380 U.S. 51.* Addressing itself to the Maryland statutory scheme the Court stated:

> Although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute, we think that appellant's assertion of a similar danger in the Maryland apparatus of censorship—one always fraught with danger and viewed with suspicion — gives him standing to make that challenge. In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.
>
> "It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that

appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.

"How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In *Kingsley Books, Inc. v. Brown, 354 U.S. 436, 1 L ed 2d 1469, 77 S. Ct. 1325, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing.* The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected." (Emphasis supplied.)

The City of Chicago licensing ordinance for motion picture film, not called into question in the *Times Films* case, was before the Court in *Teitel Film Corporation v. Cusack, 390 U.S. 139* (1968) and was declared unconstitutional in part for failure to provide by its terms for procedural safeguards held constitutionally required in the area relating to the exercise of *First Amendment* freedoms. The Court stated:

"In *Freedman v. Maryland, 380 U.S. 51, 58-59, 13 L ed 2d 649, 654, 655, 85 S. Ct. 734,* we held '. . .that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a *specified brief period,* either issue a license or go to court to restrain showing the film.'. . . [T]he procedure must also assure a *prompt final judicial decision,* to minimize the deterrent effect of an interim and possibly erroneous denial of a license.' (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure 'that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.' (2) *The abscene of any provision for a prompt judicial decision by the trial court violates the standard that* '. . .the procedure must also assure a prompt final judicial decision. . . .'

"Accordingly, we reverse the judgments of the Supreme Court of Illinois and remand the case for further proceedings not inconsistent with this opinion."

In a case entitled *Carroll v. President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968) this Court again reiterated the need for procedural safeguards in the area of the exercise of *First Amendment* freedoms when it stated:

"The Court has emphasized that '(a) system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books v. Sullivan*, 372 U.S. 58, 70, 9 L Ed 2d 584, 593, 83 S. Ct. 631 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57, 13 L Ed 2d 649, 654, 85 S. Ct. 734 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland*, supra, at 58, 13 L Ed 2d at 654, a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' "

In most of the cases cited herein for support of the position of the parties that procedural due process in the area of *First Amendment* freedoms requires a constitutionally valid statutory procedure, the Court did in fact strike down statutory procedures which were as the Court stated in essence "infected with the statutory vice of vagueness or impermissible overbreath". The language of the Court in those cases reiterates time and time again that rigid procedural safeguards must be employed and those rigid procedural safeguards must insure that there will be no curtailment "of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line."

Mr. Justice Frankfurter has once said, "The history of American Freedom, is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945). Although this was said in the context of criminal procedure,

the views expressed were reaffirmed and elaborated on in *Speiser v. Randall, supra,* when Mr. Justice Brennan for the Court wrote as follows:

> "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 441, 442, 1 L ed 2d 1469, 1473, 1474, 77 S. Ct. 1325; *Near v. Minnesota,* 283 U.S. 697, 75 L ed 1357, 51 S. Ct. 625; cf. *Cantwell v. Connecticut,* 310 U.S. 296, 305, 84 L ed 1213, 1218, 60 S. Ct. 900, 128 ALR 1352; *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 96 L ed 1098, 72 S. Ct. 777; *Winters v. New York,* 333 U.S. 507, 92 L ed 840, 68 S. Ct. 665; *Niemotko v. Maryland,* 340 U.S. 268, 95 L ed 267, 71 S. Ct. 325, 328; *Staub v. Baxley,* 355 U.S. 313, 2 L ed 2d 302, 78 S. Ct. 277.
>
> "To experienced lawyers it is commonplace that the outcome of a lawsuit – and hence the vindication of legal rights – depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. *Powell v. Alabama,* 287 U.S. 45, 71, 77 L ed 158, 171, 53 S. Ct. 55, 84 ALR 527. *When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement*

> *of constitutionally protected rights — rights which we value most highly and which are essential to the workings of a free society. More over, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances,* cf. Dennis v. United States, 341 US 494, 95 L ed 1137, 71 S. Ct. 857, and Whitney v. California, 274 US 357, 71 L ed 1095, 47 S. Ct. 641, both supra, *the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.* Compare Kunz v. New York, 340 US 290, 95 L ed 280, 71 S Ct. 312, 328, with Feiner v. New York, 340 US 315, 95 L ed 295, 71 S Ct 303, 328. It becomes essential, therefore, to scrutinize the procedures by which California has sought to restrain speech." (Emphasis supplied.)

More recent cases have adhered to the above-expressed views. In *Blount v. Rizzi,* 400 U.S. 410 (1971), this Court held that Federal postal statutes (*39 U.S.C. §§ 4006, 4007*) violated the *First Amendment* because of a lack of procedural safeguards, since the statutes neither required the Postmaster General to seek a prompt judicial determination of the obscenity of magazines before barring them from the mail, nor provided any assurance of prompt judicial review of the administrative proceedings.

Again, in *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), this Court had before it the question of the validity of an injunction against distributing "any literature" in an Illinois town. This Court emphasized that:

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Even more recently, this Court refused to sanction the prior restraint upon the publication of the "Pentagon Papers" by two newspapers. *New York Times Co. v. United States*, 403 U.S. 714 (1971). The *per curiam* opinion of the Court cited *Bantam Books, Inc. v. Sullivan, supra; Near v. Minnesota*, 283 U.S. 697 (1931), and *Organization for a Better Austin v. Keefe, supra*, and then held that the Government had not met its heavy burden of showing a justification for a prior restraint against publication of the classified study therein involved. *New York Times Co. v. United States, supra*, at 714.

It is in the context of the above history of procedural safeguards and presumptions against the validity of prior restraints that the procedures herein must be judged.

First, the procedures utilized by the Respondents herein are *ad hoc*. They are not pursuant to a statutory scheme designed to focus searchingly on the question of obscenity *vel non* of the materials, nor are they pursuant to a statutory scheme which requires a judicial decision within two days of the conclusion of the trial. Cf., *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

Second, the Respondents were not proceeding pursuant to a *statutory* scheme at all. The only statute to which the Complaints referred is the Georgia criminal statute referring

obscene material, *Georgia Code § 26-2101* (Appendix, pp. 19-21; 38-40), and that was to utilize the statute's test for obscenity.

Moreover, the trial court held its hearing on January 13, 1971, but the decision of the trial judge was not rendered until April 12, 1971, which is eighty-nine (89) days, or nearly three months. Nothing except the judicial caseload and work habits of the trial court judge operated to produce the decision within that length of time; it might have been longer or shorter, depending upon the vagaries of the situation. Certainly, no Georgia statute or case law required a decision within a given period of time, let alone the two days contained in the New York Statute approved in *Kingsley Books, Inc. v. Brown, supra.*

In *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971), this Court was called upon to determine the constitutionality of *19 U.S.C. § 1305 (a).* In an opinion by Mr. Justice White, announcing the judgment of the Court which expressed the views of six members of the Court, it was held, *inter alia,* that *§ 1305 (a)* was to be construed as requiring that judicial forfeiture proceedings be instituted no more than fourteen days after the seizure of allegedly obscene materials and that a final decision in the District Court be reached no more than sixty days after the filing of the action. *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 374, 375.

The above case is not instructive in considering the validity of the approach used by Respondents in this case. First, no statute is available to be construed; second, the time

period involved herein is greater by nearly one-third than that approved in *Thirty-Seven Photographs, supra.*

In summary, the *ad hoc* procedure utilized by Respondents did not conform to the requirements of *Freedman v. Maryland, supra; Teitel Film Corporation v. Cusack, supra; Blount v. Rizzi, supra;* or even *United States v. Thirty-Seven Photographs, supra,* and therefore, the rights of Petitioners guaranteed by the Constitution have been violated by the decision of the Supreme Court of Georgia and the same should be reversed.

4. WHETHER THE DISPLAY OF ANY SEXUALLY ORIENTED FILMS IN A COMMERCIAL THEATRE, WHEN SURROUNDED BY NOTICE TO THE PUBLIC OF THEIR NATURE AND BY REASONABLE PROTECTION AGAINST EXPOSURE OF THE FILMS TO JUVENILES, IS CONSTITUTIONALLY PROTECTED?

The Report of Commissioners Hill and Link, concurred in by Commissioner Keating, popularly known as the *Minority Report to the Commission on Obscenity and Pornography* (September 30, 1970, United States Government Printing Office) at page 422 and 423, describes twenty-two (22) categories of sexually oriented publications which the Minority contends equates with and are synonymous to obscenity in the legal sense:

1. The Stag Film
2. The Sexploitation Film
3. The Commercial X-rated Film

4. The Commercial Unrated Film
5. Advertisements for X and Unrated Films
6. Underground Sex Publications
7. Underground Newspapers
8. Mimeographed Underground Newspapers
9. Sensational Tabloids
10. Homosexual Magazines
11. Sex-violence Magazines
12. "Spreader" or "Tunnel" Magazines
13. Tennage Sex Magazines
14. Pseudo-scientific Sex Publications
15. So-called Nudist Magazines
16. Lyrics on Commercially Distributed Rock Records
17. Sex-action Photographs
18. Sex-action Records
19. Sex-action Slides and Tapes
20. Mail Order Advertisements for the Above
21. Paperbacks with themes of Homosexuality, Sado-masochism, Incest, Bestiality
22. Hardcover Books devoted to Homosexuality, Sado-masochism, Incest

The Minority thus issues a clarion call to prosecutorial officials throughout the country, State and Federal, to review all such materials within their geographical jurisdiction falling into any of the enumerated categories, to consider suppression of the protected dissemination by court action, civil or criminal.

In this day when we read about heavy court caseloads, judicial dockets being overcrowded, the potential of our appellate courts breaking down, the proposal of the Minority

is an invitation to open anarchy and is ludicrous, and invites unconstitutional censorship and prohibited prior restraint under the color of judicial sanction, at least at the *nisi prius* level of courts, State and Federal.

In March 1954, Professors Lockhart and McClure, Volume 38, No. 4 of the Minnesota Law Review, in their article entitled "Literature, The Law of Obscenity, and The Constitution", discussed the obscenity problem presented in the Doubleday & Co. book by Edmund Wilson entitled *Memoirs of Hecate County*.

Edmund Wilson, who recently passed away, was the Nation's foremost literary critic, but yet, serious reviewers took entirely different viewpoints of the book with some contending it was pathological and filled with offensive vulgarity that defied description and yet others called it a literary masterpiece.

Within a few months, *Memoirs of Hecate County* was under attack for obscenity in New York, San Francisco and Los Angeles. The major battle was fought in New York where Doubleday itself was charged with publishing and selling an obscene book. This was the first case to reach the Supreme Court squarely raising the question of obscenity and the First Amendment. This Court divided equally with no opinion *Doubleday and Company v. New York*, 335 U.S. 848 (1948), Mr. Justice Frankfurter did not participate. The Lower Court estimation that the book was obscene was left standing and no guidance for future cases or conduct from any appellate court or this Court was rendered.

The *Yale Law Journal* in 1969 published an article by Al Katz in *Volume 79*, at *page 209*, entitled "Free Discussion v.

Final Decision: Moral and Artistic Controversy and the *Tropic of Cancer* Trials."

Mr. Katz indicated that shortly after publication, Federal authorities announced that there would be no prosecutions for the passage of *Tropic of Cancer* by Henry Miller through the mailes. He went on to state:

"[W]ithin a year, over sixty local communities - from the stereotypicany provincial to the mythically sophitisticated - had commenced legal proceedings against the book."

The article undertakes to discuss the eight trial which were held throughout the country to suppress the *Tropic of Cancer* and this article clearly shows again the difficulty experienced by well-intended, well-meaning individuals who attempt to make a value judgment of the merit, worth, value, appeal and tolerance of a publication, guided by their own subjective feelings.

It becomes clearly apparent that much confusion exists and tha the emphasis in so-called obscenity litigation should change from that of expression to that of action.

Thomas I. Emerson in his recently published book, *The System of Freedom of Expression* (Random House, 1970) sets out at page 495 - 503 what he entitled and what he considers to be "Proposed Theory of Obscenity Controls".

> "If an obscene communication is forced upon another person against his will it can have a "shock effect" and such a communication can properly be described as "action." An obscene telephone call is an

obvious example. But the problem is not confined to that form of communication. Generally speaking, as already noted, the effects of erotic material upon the recipient are presently unknown. But the available evidence does seem to establish that exposure to such material is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault. The harm is direct, immediate, and not controllable by regulating subsequent action. Such communications can therefore realistically be classified as action. Moreover, from a slightly different point of view, forcing obscenity upon another person constitutes an invasion of his privacy, and for that reason also falls outside the system of freedom of expression." The distinction between this area of conduct and the expression protected by the First Amendment touches a limited but central feature of the obscenity problem.[46]

"In addition to drawing the line between expression and action, it is necessary to deal with one other major issue posed by the obscenity laws. This is the place of children in a system of freedom of expression. As previously indicated, that system cannot and does not treat children on the same basis as adults. The world of children is not the same as the world of adults, so far as a guarantee of untrammeled freedom of the mind is concerned. The reason for this is, as Justice Stewart said in *Ginsberg*, that a child "is not possesses of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." He is not permitted that measure of independence or able to exercise that maturity of judgment, which a system of free expression rests upon. This does not mean that the First Amendment extends no protection to children;

it does mean that children are governed by different rules. This differentiation concerns one of the most delicate aspects of the obscenity problem and embodies as key concept for dealing with that problem.

"Upon the basis of these considerations the guiding principles emerge. Any communication that can be classified as "expression," whether or not containing erotic material, is protected against any kind of abridgement by the government. In terms of the obscenity laws this means primarily that restrictions upon alleged obscenity are permissible only if a communication having a shock effect is forced upon a person against his will, or if the restriction operates only to limit dissemination of erotic materials to children." These general principles require some further elaboration and a testing against the realities of the current obscenity problem.

"Appraisal of the full protection approach is best made through an examination of its impact upon the various social interests that obscenity laws are thought to foster. Proponents of such laws have never been very precise in defining these interests. Nor has the Supreme Court thanks to the two-level theory, done much to clarify the situation. Commentators have been more fruitful, but not always agreed. If an attempt is made, however, to classify the possible social interests in terms most relevant to the problem of adjusting obscenity controls to the system of freedom of expression, the issues resolve into the protection of society agains (1) immediate harmful actions resulting from exposure to erotic materials; (2) longer-range, more remote, harmful actions; and (3) internal reactions of the individual, not necessarily reflected in overt action. The third category in turn breaks down into (a) the fantasy effect and (b) the

shock effect. At another level are (4) the possible harmful results, of any of the types mentioned, from the exposure of children to erotic materials.[47]

(I) The possibility of immediate harmful action following from exposure to erotic material would seem to supply the strongest reason for prohibiting access to such materials. Nevertheless this likelihood, or even certainty, would not justify restriction of expression under the theory of the First Amendment here advocated. The government is expected to direct its restrictions to action and the possible advantage of preventing the action from occurring in some cases by a prior suppression of expressioin all cases would not warrant the damage done to expression. Only if the communication is so closely linked to action as to be considered a part of it could the government punish or restrict the earlier stage. If this position is sound when expression consists of direct advocacy of violence or other violation of law it would appear equally sound in the case of obscenity.

Indeed, the argument for suppression of erotic materials, on the ground they may induce illegal action, would seem substantially weaker than the argument for suppressing direct advocacy of illegal action. In the latter case the connection between the expression and the action, while often uncertain and remote, is generally thought to exist. In the former case there is no conclusive proof that any connection exists. Moreover, while the scientific case has not been demonstrated either way, there is substantial evidence that the relationship between erotic material and illegal action is at most tenuous and sporadic. Thus the leading study of sex crimes, by members of the Institute for Sex Research, reports: "It would appear that the possession of pornography does not differentiate sex offenders from nonsex offenders.

Even the combination of ownership plus strong sexual arousal from the material does not segregate the sex offender from other men of comparable social level." There is also evidence that the reading of erotic material may, by acting as a catharsis, in some cases diminish illegal acts. In addition, there is no reason to suppose that only the "objectionable" erotic materials would have the feared effect, and hence there is no ground for singling out the particular kind of eroticism the obscenity laws seek to reach. Under such circumstances the presumptions in favor of First Amendment rights would plainly call for no departure from the principles applied to other forms of expression.[48]

(2) The social interest in the longer-range, more remote, effects of exposure to obscenity affords even less support for obscenity laws. Again there is no conclusive scientific basis for asserting that erotic materials shape attitudes or character in a manner that is harmful to society in the long run. It is most likely, of course, that reading does change attitudes and character; at least most people, especially writers, certainly assume so. Erotic reading may be injurious in its long-term effects. But no one contends that expression in any other area can be suppressed on such grounds. To do so would destroy the system of freedom of expression. Censorship of expression relating to sexual matters on any such basis is equally contrary to the fundamental premises of a system of freedom of expression and equally destructive.

(3) (a) The original purpose of the obscenity laws was undoubtedly far less concerned with the impact of erotic materials on overt behavior than with their impact on internal moral standards. The arousing of lustful thoughts was held to be morally corrupting and it was felt necessary that society protect its

members from such dangers. These moral considerations undoubtedly remain the chief driving force behind obscenity laws in the present day; otherwise it is hard to account for the emotional fervor that still surrounds the enforcement of such laws. There can be little doubt that erotic materials are designed to, and do, result in "heightened sexual arousal" in many persons under proper circumstances, ranging from mild sexual excitement to orgasm. The question is whether the government may constitutionally attempt to prevent its citizens from voluntarily seeking such sexual fantasies by a system of censorship. The state may, of course, enact legislation to promote and protect the morals of its citizens. But under the First Amendment it may not pursue that goal by means of restricting expression. No one disputes that the government cannot suppress speech or writing for the purpose of shielding its citizens from nonsexual thoughts or fantasies, regardless of their effect upon moral character. There is no basis in the First Amendment, or in the concepts underlying our system of freedom of expression, for applying a different rule in the case of sexual thoughts.[49]

It should be added that not only is the prohibition of erotic materials, voluntarily sought by adults, incompatible with a system of freedom of expression, but such censorship is futile and discriminatory as well, Our society is crammed full of sexually stimulating reading matter, sights and events. It is literally impossible for the government to suppress all stimuli that may arouse sexual excitement, any more than it can elimiate sex. Nor can it suppress even the most erotic without eliminating much of the world's literature and art. The consequence is, already noted, that the impact of obscenity laws falls primarily, or would if the laws

could be enforced, upon particular groups in our society who happen not to prefer or be able to afford elite pornography.

(b) When erotic materials are not voluntarily acquired or perused, but are thrust upon an individual or the general public, a different question is presented. If such a communication entails a shock effect it may be classified as "action" and subjected to appropriate regulation. The treatment of erotic communications in this manner raises some troublesome questions. Ordinarily an individual seeking to exercise the right of expression is allowed considerable leeway in obtaining access to other persons, whether or not such persons have indicated a desire to receive the communication. The emotional response to a communication, even if agonizing, is normally not ground for curtailing expression. A system of freedom of expression is supposed to "invite dispute" and encourage "robust and wide-open" controversy. Under such a system even the law of libel should not authorize restriction upon communication short of an invasion of privacy. Why, then, should erotic communication be considered to pose any different problem? The answer lies in the intensity of the psychological forces that pervade our society in the area of sex. This is what creates the engulfing popular demand for obscenity laws. In our concept of privacy the sexual realm occupies an important, not to say the central, part. The notion of a "captive audience," compelled to see or hear erotic communications, is intolerable to us. It seems reasonable, therefore, to give the ordinary person and the public at large greater protection against unwanted intrustion from the presentation of erotic material than is afforded in other areas of expression.

If one accepts this approach many further issues remain. The first question is how to define the erotic

material that would be subject to restriction under this "shock effect" concept. Most likely the phrase "patently offensive because it affronts contemporary community standards" provides the best answer. Such a formula, while vague as all formulae in this area are vague, embodies the elements that must be taken into account. Other questions concern the kinds of regulation that would be permissible. These would seem to fall into two categories. The first would relate to public displays of erotic material. Thus an advertisement on a billboard or on a theater marquee might be prohibited whereas the same advertisement in a book could not. Public nudity is subject to regulation but pictures of nudes in a magazine are not. The other category involves erotic material forced into the home. It is important not to proscribe a legitimate right of access. But if a householder affirmatively makes his views known, with sufficient specificity, the government would be entitled to enforce his wishes. The difficult question here concerns radio and television. In view of the fact that radio and television signals are broadcast publicly, and enter the household without much opportunity for selection in advance, the shock effect concept would probably apply in this area also.[50]

The Supreme Court, it should be noted, has given some indication that it is prepared to accept the "shock effect" doctrine. Thus in the course of its per curiam opinion in *Redrup* the Court observed that in none of the three cases before it "was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." The following term, in *Fort v. City of Miami*, the Court let stand a conviction for public display of allegedly obscene sculptures in the defendant's backyard. The Court has not, of course,

followed the proposal made here that the shock effect principle constitute the only ground for restriction of erotic communication to adults.[51]

(4) Acceptance of the principle that children are not part of the adult system of freedom of expression still leaves some unresolved problems. First of all it is necessary to define what materials are to be judged "obscene" for children, or otherwise proscribed for them. Such a task takes us beyond the limits of this book, and no real answers to the question will be attempted. By hypothesis the full protection theory of the First Amendment cannot be applied. Nor, in view of the present lack of knowledge about the subject, can the clear and present danger test be employed, or any test based on the effect of obscenity on children. Even a balancing test would not be feasible. We are left then, at least for the time being,with little more than a due process test–that the restriction be a reasonable one. Such a test can be supplemented by the principle that a presumption exists in favor of First Amendment rights, and can be narrowed by use of the void for vagueness rule and similar procedural devices. Over the course of time sufficient knowledge may be gained to refine and elaborate the test. But presently the courts can probably do little more than accept the legislative standard if it comes within the broad contours of reasonableness.

While the legislature may have considerable leeway in the choice of standards, it is severely circumscribed by the need to fit the restrictions pertainining to children into the system of freedom for adults. Under the *Butler* doctrine the rights of adults cannot be curtailed by regulations designed to protect children. In the case of motion pictures or

the theater, this problem is easily solved. A classification system can be established and children refused admission to those performances designated obscene under it. Otherwise, the problem of drafting regulations that will be effective for children and not interfere with adults is almost unsuperable. A classification scheme in a bookstore, by which certain shelves are marked "For Adults Only," presents obvious difficulties. Any exceptionally tight system for preventing sales to minors that resulted in retailers not stocking books banned for children would run afoul of the *Butler* rule. In any event, as long as material is available to adults it is hopeless to try to keep it out of the hands of adolescents.

In short, while *Butler* stands, laws attempting to restrict the availability of erotic materials for minors are likely to be ineffective. Controls over such matters will have to remain, as they undoubtedly should, with parents, schools, churches and similar institutions. Legislation can partially reinforce those controls and it can give the public a feeling that "something is being done." Beyond this it is likely to have little practical significance.

"To conclude, it is possible to bring obscenity laws into line with the basic principles of a system of freedom of expression. Dissemination of erotic materials to those who voluntarily choose to read or see them would be protected under the First Amendment. Forcing such material upon individuals who did not want them, or did not want their children to have them, or upon the public at large, would be prohibitable. Special rules could be made for children so long as they did not infringe upon adult rights.

A system of this sort appears entirely feasible. Denmark and Sweden seem to have found it

> workable. Furthermore, the public demands for obscenity laws, which have led the courts to abandon all ordinary First Amendment doctrine in dealing with obscenity, might well be satisfied with such a system. Public morality would be upheld; those who did not voluntarily choose to read or see erotic materials would be protected; and parental control over material available to children would be supported. To go beyond this and try to keep erotic materials away from adults who want to see them is rather hard to justify in this day and age. A majority of the Supreme Court in effect conceded this in the *Stanley* case. Finally, a system of this kind would be honest. It would not ban "hard-core" pornography and allow elite pornography. Nor would it remain largely unenforced. The most likely consequence would be, as the Danish experience has shown, that, pornography no longer being unlawful and therefore tempting, the volume in circulation would diminish.[52]
>
> (Footnotes omitted)

It is interesting to note that the total retail sales of adult-only publications has been reported in the Report of the Commission on Obscenity and Pornography, Traffic and Distribution Panel, at page 103, to be between 55 and 65 million dollars, predicated on 1969 calculations. It is estimated again by this Commission (see Table 2, at page 74) that the total volume of sexually-oriented movies at the box office would be between 450 and 460 million dollars and this includes R and X rated, sexually-oriented, unrated, and sex-exploitation films. It was further estimated that the total volume of receipts at the retail level in sexually-oriented materials totals between 537 and 574 millions of dollars. These figures do not support any suggestion that sexually-oriented materials exceed community standards if the community supports with its dollars this volume of business.

Since almost everything else in our economy has increased by approximately 7 per cent since 1969, it could be conceivably stated that the current volume would be in excess of 600 million dollars in the traffic of sexually-oriented material at the retail level.

It is further noted by the Commission on Obscenity and Pornography, Law and Law Enforcement Panel, at page 43 "a national survey of American public opinion sponsored by the Commission shows that a majority of American adults believe that adults should be allowed to read or see any sexual materials they wish." This survey was conducted in 1969, and another survey conducted by the same opinion research firm, Response Analysis, in January 1971 indicates that 74 per cent of the American people chosen on a demographic basis believe that adults should be allowed to obtain or view sexually-oriented materials under circumstances of dissemination that forewarn the public of the character thereof, where precautions are taken to exclude juveniles from exposure.

When we view the difficulty in defining what is obscene (see Bender, "Definition of 'Obscenity' Under Existing Law", Technical Report of the Commission of Obscenity and Pornography, Volume II, page 5), it is clear that the conept of focusing on expression versus conduct of the disseminator has not worked.

What we come to, in essence, is that the Georgia Obscenity Law and indeed, the obscenity law of any state or of the Federal Government, should be declared unconstitutional facially and as applied inasmuch as said

statutes are repugnant to the *First Amendment* to *Constitution of the United States* and the *Fourteenth Amendment* as it may apply to the States.

Thus, focusing on action versus expression, this Court should pronounce the correct doctrine, as law and indeed the true meaning of *Roth v. United States, supra,* to be the following:

> The definiton of what is legally obscene does not become relevant until the disseminator impermissibly encroaches upon the rights of other by the circumstances of the dissemination or proposed dissemination.

The motion picture theatres named as Petitioners herein were engaged in the dissemination of presumptively protected *First Amendment* sexually oriented films in a controlled, adults-only atmosphere. There was no evidence of *Ginzburg*-type pandering (widespread indiscriminate mailing of five million brochures which by the language of said brochures classified the material being offered for sale by mail order, as OBSCENE). There was no intrusion into the privacy of unwilling individuals who wished to avoid confrontation with this kind of material, and there was no admission of minors or offering to exhibit to minors under any state statute reflecting a specific and limited state concern for juveniles. Ideed, the decision of the trial court so holds.

It would appear that this Court, by its decisional process, has held that only when there exists an encroachment on the constitutional rights of others may the Government constitutionally punish an offender for violation of Government obscenity laws, State or Federal.

This Court in *Roth v. United States, supra,* at 488, stated:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to precent their erosion by Congress or by the States. The door barring Federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interest."

At this point in the opinion a footnote, No. 23, directs us back to footnote 14 of the opinion.

Footnote No. 14 follows these words by the court:

> "All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinions – have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interest."* (Emphasis supplied)

The footnote No. 14, referenced in *Roth,* cites among others, the case of *Breard v. Alexandria,* 341 U.S. 622 (1961).

The Breard case which involved the construction of an ordinance was held *inter alia* as applied to solicitors of magazine subscriptions, not to unconstitutionally abridge freedom of speech and press.

The opinion of this Court, addressing itself to the exercise of *First Amendment*, rights of Petitions herin stated:

> "The First and Fourteenth Amendments have never been treated as absolutes. *Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses.* Rights other than those of the advocates are involved. By adjustment of rights we can have both full liberty of expression and an orderly life. (Emphasis supplied.)

This Court in a per curiam opinion in *Redrup v. State of New York*, 386 U.S. 767 (1967), appeared to delineate what may have been meant in *Roth* and *Breard* concerning "encroachment" upon rights of others, which may be significant in determining whether material alleged to be obscene is without the ambit of the *First Amendment*, when it was stated:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles ... In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollak*, 343 U.S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463."

In the *Pollak* (1951) 343 U.S. 451 case, it would appear that this Court did not find any "encroachment" on the rights of two individuals as passengers on D.C. Transit buses, in the exercise of their *First Amendment* rights to

communicate in public places, when considered in light of the finding of the Public Utilities Commission that the radio broadcasts in the buses were in the interest of the general public.

Thus in *Pollak*, the "encroachment" when adjusted to the rights of others did not "compel a finding by the Court that the radio program interfered substantially with the conversation of passengers or with rights of communication constitutionally protected in public places," of the majority.

This Court after its per curiam opinion in *Redrup v. New York, supra*, granted Certiorari and/or review in more than thirty-three (33) cases coming before the Court, and summarily reversed the findings of obscenity.

This Court in *Ginsberg v. State of New York*, 390 U.S. 629 (1968), in holding a state statute in question as reflecting "a specific and limited state concern for juveniles." *Redrup v. New York, supra*, went on to state:

> "The 'girlie' picture magazines involved in the sales here are not obscene for adults."

A footnote No. 3 at this point states in part:

> "Other cases which turned on findings of nonobscenity of this type of magazines include *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50; *Conner v. City of Hammond*, 389 U.S. 48; *Potomac News Co. v. United States*, 389 U.S. 47, . . ."

The various inferior Federal Courts and state appellate courts, in viewing *Redrup v. New York supra*, as

The various inferior Federal Courts and state appellate courts, in viewing *Redrup v. New York supra*, as the same has been apparently historically applied by the U.S. Supreme Court, have held to the "juveniles." "encroachment" and "Gi nzburg pandering" standards for determining criminal conduct and;or obscenity of the publications before the various Courts, sufficient to remove the protection afforded the interested adult public in their exercise of constitutionally protected freedom of press and speech.

In an en banc per curiam decision joined in by all five (5) members of the United States District Court for the District of Maryland, *United States v. 4,400 Copies of Magazines, Including 200 Copies each of Magazines Entitled Cover Girl Nos. 5, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16; and Exciting Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16*, reported in 276 F. Supp. 902 (December 21, 1967) it was stated in pertinent part:

> "It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.
>
> * * *
>
> "... this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in Ginzburg v. United States, 383 U.S. 463, at 465-466, they would not be entitled

to the protection of the First Amendment."

Today, absent Ginzburg-type pandering foisting on an unwilling public, or distribution to minors, no publication or motion picture film should be obscene in the constitutional sense. *Redrup v. New York, supra,* at page 769; *Breard v. Alexandria, supra; Public Utilities Commission v. Pollak, supra; Stanley v. Georgia, supra; Poulous v. Rucker,* 388 F. 305, 307. The statute herein must be construed and interpreted to incorporate these tests. (Georgia Code Section 26-2101.)

As noted, *Redrup, Breard* and *Public Utilities* focused on the prohibition of fosting on a captive audience. *Stanley* dealt with so-called hard-core material. *Stanley* 394 U.S. at 567, made it plain that prohibited distribution under *Roth* now means that which intrudes upon the privacy of the general public, and the *Stanley* citation of *Redrup,* 386 U.S. at 769, should leave no doubt. Furthermore, this statement in *Stanley* must be viewed in the context of this Court's clear recognition, 394 U.S. at 564, 566 (citing *Winters v. New York,* 333 U.S. 507, 510) of the right to receive information regardless of its social worth, and that the question of whether obscene material is arguably devoid of any ideological content is not relevant because the line between the transmission of ideas and mere entertainment is too elusive "for this court to draw, if it can be drawn at all." Furthermore, *Stanley* explicitly recognized, 394 U.S. at 566, that there is little empirical evidence that exposure to obscene materials may lead to crimes of sexual violence. In short, *Stanley* recognized that prior distinctions as to whether material is classified as hard-core is not relevant. If it is not

pandered in the *Ginzburg* tradition or foisted on an unwilling public or exposed to juveniles, it is protected under the *First Amendment.*

This Court, in *United States v. Reidel,* 402 U.S. 351 (1971), seemed to say, in reliance upon *Roth v. United States, supra,* that a conviction for indiscriminate mailing which could potentially be sent to consenting and unconsenting adults, as well as juveniles, was not within the area of constitutionally protected speech and press. In that case, the trial court assumed for the sake of the motion which was appealed to the Supreme Court, that the materials in question were, in fact, obscene and without the protection of the *First Amendment.*

Likewise, in *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971), the plurality of this Court held that concededly obscene material seized by customs officials could be held if the same were intended for eventual commercial use, again assuming wide-spread indiscriminate dissemination.

The question thus presented here was not resolved by those opinions and it can be discerned that a constitutionally valid construction of a statute could be enacted permitting communication, the actual construction sale and distribution to consenting adults and reasonable protections against exposure to juveniles. We do not, as was done in the *Reidel* and *Thirty-Seven Photographs* cases, concede that the motion picture films before the Court are obscene in the constitutional sense, but to the contrary, that although they may be dealing with a sexual theme, this does not mean that they are presumed to be obscene. As was wisely pointed out in *Roth,* at page 47, where it was stated "sex and obscenity are not synonymous."

Professor Harry Kalven, Jr., in his article appearing in the November 1971 edition of the Harvard Law Review, Volume 85, No. 1, beginning at page 3, at pages 229-237, undertakes to critically review the opinions of this Court in *Reidel* and *Thirty-Seven Photographs*. Mr. Kalven comes to the conclusion, as a proposed solution and suggestion to the problems of obscenity litigation confronting and confounding this Court:

> "This judicial task of line-drawing might be legitimately simplified through the use of presumptions, though hardly the all-embracing one involed in *Roth*. For example, it may be presumed that commercial distribution, with its generally large and nonselective class of recipients, indicates insufficient individual intersts in privacy and freedom of thought to justify shielding any such activity from regulation. This would follow the result, if not the reasoning, of both *Riedel* and *Thirty-Seven Photographs*. Such a presumption could be phrased as a requirement that *Roth* control unless the defendant raised a substantial threshold claim that a protected privacy interst was being invaded."

It is intersting to note when reviewing the list of cases on the 1972-1973 Docket of this Court, 41 LW 3005, that of the first eighteen (18) listed in chronological order, at least eleven (11) relate to the subject of Obscenity and the *First Amendment*.

This suggested concept of restriction on action versus expression where there must be intrusive behavior on the part of the disseminator before sexually-oriented materials presumptively protected under the First Amendment can be criminally or civilly proscribed has apparently been accorded

recognition by the Supreme Court of the Commonwealth of Pennsylvania in two separate cases that have been heard by that court.

In connection with the pocket novel Candy, the subject of a civil proceeding in the Courts, the Supreme Court of Pennsylvania in *Commonwealth v. Dell Publications, Inc.*, 233 A.2d 840 (1967) stated in pertinent part:

> "On May 8, 1967, without the fanfare of its trilogy, the Court handed down a cryptic per curiam opinion disposing of three consolidated cases, *Redrup v. State of New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515, which may yet to be the most significant of its obscenity opinions. The impact of this opinion, along with those cases summarily decided on the last day of the term, comes as close to a holding that, in the eyes of the present Court, 'Candy' is not per se constitutionally obscene as is possible without a direct ruling on the book itself. Although the Court had originally granted review in Redrup to consider problems of *scienter* upon the assumption that the materials involved were obscene in the constitutional sense, it decided to dispose of the case upon the ground that they were not obscene under the first and fourteenth amendments.
>
> "*Redrup* seems to signify the Court's final abandonment of its futile search for a determination of obscenity *vel non*. For significantly instead of attempting to determine what constituted obscenity, the Court approached the problem in terms of those circumstances under which the publication of otherwise unobjectionable material might be constitutionally restricted, 87 S.Ct. at 1415:

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Commonwealth of Massachusetts*, 821 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; ct. *Butler v. State of Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; *Public Utilities Comm'n of District of Columbia v. Pollak*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzbyrg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31."

"As has already been indicated in this opinion, none of the three situations described in Redrup are present in the case at bar." (Emphasis supplied).

When next the substantive question of obscenity was presented to the Court, in an opinion filed November 11, 1969, in a case styled *Duggan v. Guild Theatre, Inc. et al*, 258 A.2d. 858, March Term 1969, the Opinion of the Court on this question stated as follows:

"We also noted that none of the circumstances identified in *Redrup v. New York*, 386 U.S. 767, 768, 87 S.Ct. 1414, 1415 (1967) are present in this case. The injunction does not reflect a 'specific and limited state concern for juveniles, there was no evidence of an assault upon individual privacy in a manner so obtrusive as to make it impossible to avoid exposure, and there was no evidence of 'pandering.' "

* * *

"We must therefore, hold that 'Therese and Isabelle' may not constitutionally be banned. Accordingly the decree restraining the exhibition of the movie is vacated and the case is dismissed."

And as cited previously, Mr. Justice Potter Stewart in his dissenting opinion in the case of *Ginzburg v. U.S.*, 383 U.S. 463 (1966) at page 499, stated with respect to the alleged *Roth-Alberts* test of obscenity in Footnote 2 as follows:

"It is not accurate to say that the Roth opinion 'fashioned standards' for obscenity because as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved. 354 U.S. at 481. In no subsequent case has a majority of the Court been able to agree on any such 'standards'."

Mr. Justice Stewart in his dissent went on to say:

"There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-core pornography, without trying further to define it. Jacobellis v. Ohio, supra. In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of thing to which I have referenced."

Thereupon, Mr. Justice Stewart used the following language to describe what he meant by "hard core pornography":

"Such materials include photographs, both still and motion picture with no pretense of artistic value

graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character."

Mr. Stewart in his opinion stated further:

"So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself."

At this point in his opinion he suggests rationale that was to become the ruling of the Court in *Redrup v. New York, supra,* when he states:

"Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e.g. Breard v. City of Alexandria, 341 U.S. 622; Public Utilities Commission v. Pollak, 343 U.S. 451. Still other considerations might come into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case."

In the opinion of the Court, authorizing Mr. Justice Marshall to speak on behalf of six members of the Court, in *Stanely v. Georgia,* 394 U.S. at 567, it was stated:

"But that case (Roth) dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always

the danger that obscene material may fall into the hands of children, see *Ginzberg v. New York*, supra, or that it might intrude upon the sensibilities or privacy of the general public. See Redrup v. New York, 386 U.S. 767. No such dangers are present in this case."

In further elaboration of this type of approach to criminal prosecution for alleged violation of obscenity statutes, the United States District Court for the District of Massachusetts, in an opinion filed on November 28, 1969, by a Three-Judge Court, in a case styled *Karalexis v. Byrnes*, 306 F. Supp. 1363, vacated on other grounds, 401 U.S. 216 (1971):

"We are asked to rule that this decision *(Stanley v. State of Georgia)* 1969, 394 U.S. 557 extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

* * *

"The following facts appear by stipulation of counsel or otherwise. Plaintiffs (Motion picture operator) have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginzberg v. United States*, 1966, 383 U.S. 363. Finally, it is conceded that the theatre is policed, so that non minors are permitted to enter.

"For the purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts Courts.

* * *

"The question is, how far does Stanely go? Is the decision to be limited to the precise problem of mere private possession of obscene material, (394 U.S. at 461); is it the high water mark of a past flood, or is it the procoursor of a new one?

* * *

"In recognizing that public distribution differed from private consumption, the Court in Stanley gave two examples. In the case of public distribution, 'obscene material might fall into the hands of children ... or ... it might intrude upon the sensibilities or privacy of the general public.' 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with Stanley, 'No such dangers are present in this case.'

* * *

"We think it probable that Roth remains fullly intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned."

The Court thereafter went on to say:

"If a rich Stanley can view a film, or read a book, in his home, a poorer Stanely should be free to visit a protected theatre or library. We see no reason for saying he must go alone."

Text writers have expounded upon the theory also. Professor Frank I. Michelman, Harvard Law School, wrote in *"The Supreme Court, 1968 Term," 83 Harvard Law Review 7,* 147-154 (1969) of protecting the poor through the *Fourteenth Amendment.*

> "Retreating somewhat in Stanley, the Court held that the First Amendment does indeed forbid a state to impose a criminal penality merely for the knowing, private possession of obscene material. Its opinion espoused a new approach to first amendment obscenity doctrine that has wide-ranging implications.
>
> "Writing for five members of the Court, Mr. Justice Marshall stated that private possession of obscene material is protected by the First Amendment, supplemented by a right of privacy. A purpose fundamental to the protection of free speech, he said, is the guaranty of 'the right to receive information and ideas, regardless of their social worth.'
>
> "The 'right to receive' he went on, 'takes on an added dimension' when joined as here with the 'right to be free ... from unwanted governmental intrusions into one's privacy.'
>
> "In Stanley, however, the Court found 'little empirical evidence' indicative that obscenity and harmful conduct are usually connected. More importantly, it said that 'in the context of private consumption' the state may achieve its purpose through less restrictive alternatives. It may, for example, employ education or punishment of the deviant conduct itself. The same criticism applies to laws regulating public distribution. It is unlikely that the evidence is any greater than contact with obscenity through public distribution leads to harmful conduct. Indeed, one who peruses pornography alone

in his home probably had to obtain it through public distribution in the first place. The less restrictive alternative principle also would apply, though perhaps somewhat less forcefully, to a ban on public distribution.

* * *

"Interpretation of Stanley simply as a privacy decision, however, is belief by the Court's description of the privacy factor as an 'added' consideration and its formulation of the opinion in clear First Amendment terms. The principle underpinning of the opinion is really the 'right to receive' obscene material. It is that doctrinal innovation that gives the Stanley decision elasticity. The Court's concern for a 'right to receive' ideas came to light in Martin v. City of Struthers, relied upon by the Stanley Court. There, it served to invalidate an ordinance forbidding door-to-door distribution of handbills. Martin thus acknowleges the obvious: *that receipt is simply the last step in the process of distribution. Protection of the former requies at least some protection of the latter.* Similarly in the obscenity context, the *'right to receive information and ideas, regardless of their social worth,' should serve after Stanley to protect certain forms of public distribution as well as private possession.* Surely that right may be effectively denied through a ban on all distribution of obscene material.

"So conceived, the 'right to receive' obscene material gives new meaning to the Court's distinction between private consumption and public distrubition. An attribute of privacy — just as of the 'right to receive' — is the ability to control one's personal environment. *Unwanted intrusions violate one's privacy. Yet only some forms of distribution of obscene material invade that interest.* A movie theater

showing a pornographic film, for example, is public in the sense that anyone may enter if he pays the price.But the movie it shows is not 'publicly' distributed in the sense of forcing unwanted obscenity on anyone. The theater does not invade the privacy interest in freedom from unwelcome intrusion, so long as its advertising on the street is not itself obscene. In this matter, 'public distribution' may be defined narrowly to denote those forms of distribution or display which thrust obscenity on unwilling individuals. So defined, it may be banned.

"Already, one federal court has taken a step in this direction. To preserve the constitutionality of a disorderly conduct statute punishing the use of profane language in any public place, the D.C. Circuit in Williams v. District of Columbia read into it the qualification that the Government must allege and prove that members of the public actually heard the obscene words. The Williams court spoke of 'verbal assault' as the necessary ingredient after Stanley. This opinion suggests that Stanley protects a person reading an obscene publication in a public place as well as his home.

"Stanley may, then, signal a new doctrine that would permit obscenity to be banned only when it creates a nuisance to others, when it intrudes upon their own autonomous monitoring of their emotional and intellectual intake. The essence of an obscenity offense thus would be offense. *In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will.* The presumed offensiveness of obscenity would allow the government to prohibit unwanted intrusions whereas the government is more constrained in its efforts to prohibit intrusions by, for

example, political propagandists. Conceived in this way, the shape of the new obscenity law would approximate the nuisance standard embodied in the Model Penal Code provisions on lewd conduct. Obscene publication that may be banned, like conduct that is lewd would be described as that 'which he (the offender) knows is likely to be observed (unwillingly) by others who would be affronted or alarmed.'

"The new doctrine suggested by the Stanley opinion is the product of more than a decade in which the Court has struggled with its own libertarian impulses as it battled head on with an instinctive notion that some obscenity regulation is both permissible and desirable. The emerging doctrine after Stanley may be uncertain in its own way. Mr. Justice Sutherland summarized well the necessarily contextual character of laws prohibiting offensive action. 'A nuisance,' he said, 'may be merely a right thing in the wrong place – like a pig in the parlor instead of the barnyard.' In the case of obscenity laws, the factor distinguishing parlors from barnyards should be the consent of all those brought into contact with the obscene material. Despite the continuing need for ad hoc resolution of conflicting forces, there is after Stanely at least hope that the lines of battle will be more aptly drawn." (Emphasis supplied).

This approach leaves to the individual citizen his basic right to choose his own way in life so long as it does not encroach upon the rights of others.

See:

(a) "The Metaphysics of the Law of Obscenity," The Supreme Court Review, 1960, pp. 1 to 45, by Harry Kalven, Jr.

(Cited by U.S. Supreme Court in *Stanley v. State of Georgia, supra.)*

(b) "Morals and The Constitution: The Sin of Obscenity", Vol. 63, Columbia L. R. 391, by Louis Henkin.

(Cited by U.S. Supreme Court in *Stanley v. State of Georgia, supra.)*

(c) "First Amendment: The New Metaphsics of the Law of Obscenity", Vol. 57, Calif. L. R. 1257.

(d) "Reguiem for Roth: Obscenity Doctrine is Changing", Vol. 68, Mich. L.R., pp. 185-236, by David E. Engdahl.

Mr. Chief Justice Burger, in using the words "public displays" referred to the factual situation present in the case of *Rabe v. Washington, supra,* where the screen of the outdoor motion picture theatre was clearly visible to all motorists passing over a nearby public highway and also 12-15 nearby family residences. Additionally, young children were observed viewing the film from outside the chainlink fence surrounding the theatre grounds. Here, no such indiscriminate, uncontrolled public display is involved. In the factual situation in the case at Bar, we deal with a theatre that forewarms the potential patrons of the character of the materials be offered therein. See Appendix, pages 84-86, inclusive.

Further, all precautions are taken to exclude juveniles from the premises.

In another case, entitled *Gooding v. Wilson*, 405 U.S. 518 (1972), although relating to the constitutionality of a Georgia abusive language statute, the Court stated in its majority opinion, authored by Mr. Justice Brennan:

> "[T]he statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression . . ."

The Court then pointed out it could not authoritatively supply the requisite construction of a state statute. In the case at bar, an authoritative construction has been placed on the Georgia statute as issue, but said construction has refused to limit the utilization of such statutes to those instances where the action of the disseminator has the potential of intruding upon the privacy of unwilling individuals or with blatant exposure to juveniles. Therefore, this Court should declare the statute unconstitutional for its failure to do so, reverse the decision of the Supreme Court of Georgia and reinstate the decision of the trial court.

The concept being advanced by counsel here is not without some support in some recent decisions and opinions by members of this Court relating to *First Amendment* freedoms.

In *Rabe v. State of Washington*, 405 U.S. 313 (1972), Mr. Chief Justice Burger in a separate opinion jointed in by Mr. Justice Rehyquist, concurring, stated:

> "I, for one, would be unwilling to hold that the *First Amendment* prevents a state from prohibiting such a 'public display of scenes depicting explicit sexual activities if the state undertook to do under a statute narrowly drawn to protect the public from potential exposure to such offensive materials'. See Redrup v. New York, 386 U.S. 767 (1967)."

In the separate opinion by Mr. Chief Justice Burger at footnote 1 he indicated two instances as examples of recent statutes regulating general public display in Arizona and New York.

Mr. Chief Justice Burger went on to say:

> "Public display of explicit materials such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my view, involve no significant countervailing First Amendment considerations."

Mr. Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 510 (1965), states:

> "... [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowoledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read ... Without those peripheral rights the specific rights would be less secure."

One who has the constitutional right to possess obscene material and the right to receive it, of necessity, must have

the right to purchase or view the materials. It cannot be argued that the right to read a book or to view a movie is secure on one hand, and by statute in civil or criminal proceedings preclude the sale, exhibit, or dissemination of such materials to consenting adults under nonobtrusive circumstances. These same citizens should not be required to obtain the materials, or view the materials through an illegal source, or under surreptitious circumstances in order to exercise their fundamental constitutional rights.

The conclusion in logic then is that, absent dissemination or exhibition to juveniles and the foisting upon the sensibilities of unwilling adults in a manner that the individuals cannot avoid confrontation with it, the dissemination of any sexually-oriented motion picture films and other materials is protected under the *First* and *Fourteenth Amendment* to the *Constitution of the United States.*

See also, *U.S.A. v. Lethe,* 312 F.Supp. 421 (E.D. Calif. 1970).

CONCLUSION

The United States Congress, in Public Law 90-100, found the traffic in obscenity and pornography to be a "matter of national concern". The Federal Government was deemed to have a "responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials". To this end, the Congress established an advisory commission whose purpose was "after

a thorough study which shall include a study of the casual relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective and constitutional means to deal effectively with such traffic in obscenity and pornography".

Approximately Two Million ($2,000,000.00) Dollars was given to the advisory commission for this purpose, three-quarters of which went for scientific research to various contractors on physiological and psychological effects and public opinion surveys regarding sexually oriented materials.

The overwhelming evidence was to the effect that voluntary exposure to sexually oriented materials, whether films or books, caused no harmful antisocial conduct. Approximately nine (9) technical volumes of the Commission on Obscenity and Pornography have been printed by the U.S. Government Printing Office, containing the reports and research data gathered by the Commission, supporting these findings.

After reviewing the wealth of scientific data accumulated in the research sponsored by the Commission under the mandate from Congress, a clear overwhelming majority of the Commissioners recommended the abolition of all laws relating to civil or criminal suppression of any sexually oriented materials, except, as said laws, Federal and State, could be narrowly limited by judicial interpretation to those instances where the circumstances of dissemination intrude into the privacy of others, and where there is no reasonable precaution taken against exposure to juveniles.

An authoritative judical construction could, and should be rendered by this Court, assimilating into the case law such a limiting statutory construction, as being appropriate in light of *First Amendment* guarantees.

Therefore, Petitioners respectfully pray this Court to reverse the judgment of the Supreme Court of the State of Georgia for the reasons indicated in both the Petition for Certiorari and Brief submitted herewith by said Petitioners.

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